TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 120.

PORTLAND RAILWAY LIGHT AND POWER COMPANY,
PLAINTIFF IN ERROR,

vs.

RAILROAD COMMISSION OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED AUGUST 11, 1919.

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1 & 2 In the Supreme Court of the United States.

Oak Grove Case, No. 6968.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF OREGON, Defendant in Error.

Appeal from the Supreme Court of the State of Oregon.

Frederick V. Holman and Franklin T. Griffith, Attorneys for Plaintiff in Error;
A. M. Crawford, Attorney General, Clyde B. Aitchison, and Giltner & Sewall, for Defendant in Error.

3 & 4 *Transcript.*

Case No. 6968, Drawer No. 652.

Oak Grove Case.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,
vs.
RAILROAD COMMISSION OF OREGON, Defendant.

Appeal from the Honorable Circuit Court of Marion County.

Hon. Wm. Galloway, Judge.

Frederick V. Holman and Franklin T. Griffith, Attorneys for Plaintiff and Appellant.
A. M. Crawford, Attorney General; Clyde B. Aitchison and Giltner & Sewall, Attorneys for Defendant and Respondent.

5 Be it remembered, that heretofore, on the 27th day of February, 1908, there was filed in the office of the clerk of the circuit court of the State of Oregon in and for the County of Marion, a

Complaint

in words and figures as follows:

6 In the Circuit Court of the State of Oregon for the County of Marion.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,
vs.
RAILROAD COMMISSION OF OREGON, Defendant.

Complaint.

Comes now the plaintiff above named and for cause of suit against the above named defendant alleges:

I.

That plaintiff is now and at all times since the 28th day of October, 1907, hereinafter referred to, has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and having its principal office and place of business at the City of Portland, Oregon, and during all of said times has been and is now engaged in operating street railways within the said City of Portland and railroads without the said City of Portland in Multnomah and Clackamas Counties, State of Oregon, and during all of said time has been and is now engaged in the enterprise and business of transportation of passengers as a common carrier over lines of railway with termini as follows:

(*a*) From the City of Portland, in the County of Multnomah, State of Oregon, in a general southeasterly direction to section 3 township 4 south of range 4 east of Willamette meridian in the County of Clackamas in said state, which line is known and hereinafter referred to as the "Springwater Division."

(*b*) From the said City of Portland in a general southerly direction to and through Oregon City to the town of Canemah on the Wil-amette River about one mile south of Oregon City in said County of Clackamas, which line is known and hereinafter referred to as the "Oregon City Division."

(*c*) From the said City of Portland in a general easterly and northeasterly direction to and through the said village of Lents, to Lents Junction on the line of railway first above mentioned,
7 in said County of Multnomah, which line is known and hereinafter referred to as the "Mt. Scott Division."

(*d*) From a point on the line of railway first above mentioned near the town of Cedarville in section 17 township 1 south of range 3 east of Willamette meridian in a general northerly and northeasterly direction to and through the village of Troutdale in said County of Multnomah to the Columbia River opposite Lady's Island, which line is known and herein referred to as the "Troutdale Division."

II.

That by reason of the facts, circumstances and conditions hereinafter fully set forth, plaintiff has established certain reasonable

rates of fare for the transportation of persons traveling as passengers upon its said lines of railway and between different points on its said railways and its said terminus at First and Alder Streets in said City of Portland and between Golf Junction to the places and points named below, the following rates, fares and charges, the distances being as set forth below.

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	5 cents.
Lambert	5.93 "	10 "
Knight	6.29 "	10 "
Hendee	6.44 "	10 "
Milwaukee	6.71 "	10 "
Island	7.05 "	10 "
Milwaukee Heights	7.70 "	15 "
Courtney	8.30 "	15 "
Oak Grove	8.48 "	15 "
Center	8.68 "	15 "
Risley	9.26 "	15 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 miles	5 cents.
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35 miles	5 cents.
Nickum	6.51 "	5 "
Kerrigan	7.26 "	10 "
Bell	8.51 "	10 "
Kendall	9.32 "	10 "
Lents Junction	10.71 "	10 "
Gilbert	11.65 "	10 "
Gates	12.38 "	10 "
Wilson	13.00 "	15 "
Sycamore	13.48 "	15 "
Jenne	14.43 "	15 "

8 Between Golf Junction and

On Oregon City Division.

Lambert	.57 miles	5 cents.
Knight	.93 "	5 "
Hendee	1.08 "	5 "
Milwaukee	1.35 "	5 "
Island	1.69 "	5 "
Milwaukee Heights	2.34 "	10 "
Courtney	2.94 "	10 "
Oak Grove	3.12 "	10 "
Center	3.32 "	10 "
Risley	3.90 "	10 "

On Springwater Division.

Nickum	1.15 miles	5 cents.
Kerrigan	1.90 "	5 cents.
Bell	3.15 "	5 "
Kendall	3.96 "	5 "
Lents Junction	5.35 "	5 "
Gilbert	6.29 "	10 "
Gates	7.02 "	10 "
Wilson	7.64 "	10 "
Sycamore	8.12 "	10 "
Jenne	9.07 "	10 "

III.

That plaintiff's "Oregon City Division" extends from its terminus on First and Alder Streets in Portland to and through Golf Junction on the southern boundary line of Portland and thence in a general southerly direction to Oregon City and Canemah; and that plaintiff's "Springwater Division" extends from said terminus in Portland to and through said Golf Junction and thence in a general easterly direction to and through Lents Junction and thence in a general southeasterly direction to Cazadero; and that plaintiff's "Mt. Scott Division" extends from said terminus in Portland in a general easterly and northeasterly direction, not passing through or near said Golf Junction, to and through Lents and thence in the same direction to said Lents Junction.

IV.

That plaintiff operates its cars of and from all of its said divisions within the corporate limits of the City of Portland under franchises by the terms and provisions of which it is prohibited from charging any passenger more than five cents for any one continuous ride in any one general direction on any of said cars; and that as said City of Portland has a population exceeding 50,000 inhabitants, this plaintiff is also prohibited by Section 2096 of Bellinger and
9 Cotton's Annotated Codes and Statutes of Oregon from Charging any passenger more than five cents for a continuous ride in one general direction in said city.

V.

That plaintiff charges a fare of 25¢ for a ride from its said terminus in Portland to Oregon City, a distance of 14.47 miles and that said fare is approximately at the rate of 2 cents per mile.

VI.

That because of the facts set forth in paragraph IV of this complaint, plaintiff cannot, on or for any ride on its "Oregon City Division," charge at the rate of 2 cents per mile or charge more than five cents in all for the 5.36 miles from its said terminus on First and

Alder Streets and Golf Junction as all of said 5.36 miles is within the said City of Portland; and that because it is not practical or convenient to collect fares on said Division other than in multiples of five cents, plaintiff has, for the purpose of maintaining fair and just rates throughout said division, distributed the remaining 20 cents of the 25 cent fare from Portland to Oregon City by dividing the remaining 9.11 miles of the total mileage between said cities into four districts and applying to all points within each district a group rate of five cents more than the fare to points within the next district on the north, thus: (*a*) The first district includes Lambert, Knight, Hendee, Milwaukee and Island and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 10 cents and from Golf Junction five cents less; (*b*) the second district includes Milwaukee Heights, Courtney, Oak Grove, Center and Risley and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction five cents less; (*c*) the third district includes all stations from and including Concord to and including Clackamas Bridge and the group rate applied to said district and the fare for and rate to each station in said district from Portland is twenty cents and from Golf Junction five cents less; and (*d*) the fourth district includes Park Place and Oregon City and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 25 cents and from Golf Junction five cents less.

VII.

That though the fare charged by plaintiff for one ride from Portland to the places included in said second district on said "Oregon City Division" is fifteen cents, plaintiff has established commutation rates to said places and sells commutation books to each of said places, containing twenty coupons, each of which entitles the bearer to a ride to or from Portland, at the following rates: $1.50 for Milwaukee Heights, $1.60 for Oak Grove, $1.70 for Center and $2.00 for Risley.

VIII.

That Golf Junction on the southern boundary of Portland is the junction of plaintiff's "Oregon City Division" and "Springwater Divisions," and from that point to its terminus on First and Alder Streets in Portland, plaintiff's cars of and from both divisions run over the same tracks; and that plaintiff's "Oregon City Division" extends south from Golf Junction, and on trips to or in the direction of Oregon City its cars thereon are out of Portland after leaving Golf Junction; and that plaintiff's "Springwater Division" proceeds in an easterly direction from Golf Junction, and on a trip to or in the direction of Cazadero its cars on said division remain within the corporate limits of Portland for nearly a mile after leaving Golf Junction; and that the station of Nickum is the first station on said "Springwater Division" east of Golf Junction and is only about one-half mile east of the eastern boundary of Portland; and that on said

"Springwater Division" plaintiff runs regular trains which stop for the taking on and letting off of passengers only at stations, and that as there is no station on said division between Golf Junction and Nickum and the former is within Portland and the latter but a short distance out of Portland and passengers are entitled to and can insist upon being carried to the boundary of Portland for five cents and it would be decidedly inconvenient and unnecessarily expensive and to the detriment of the service for plaintiff to stop all its trains at said boundary, plaintiff has extended the five cent fare limit on said division to Nickum as the first station outside of Portland.

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IX.

That the circumstances and conditions at and about and the service to Nickum are not like or similar to or contemporaneous with the circumstances and conditions at and about the service to the places included in said second district of said "Oregon City Division"; and that the fare charged by plaintiff from Portland to Nickum on said "Springwater Division" does not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by plaintiff from Portland to the places within said second district for the purpose of determining whether or not the latter are just or reasonable or justly or unjustly discriminatory.

X.

That plaintiff's "Mt. Scott Division" consists of a line of railway running from its said terminus on First and Alder Streets in Portland to Mt. Tabor Junction at about the intersection of Hawthorn Avenue and East Fort*h*-eighth Street in Portland, and then in a general southeasterly direction to Lents in Multnomah County, and then a distance of .62 of a mile to a junction with said "Springwater Division" at a point known as Lents Junction; and that though it is 10.71 miles from Portland to Lents Junction by the "Springwater Division", it is only 8.31 miles from Portland to Lents Junction by the "Mt. Scott Division"; and that the said "Mt. Scott Division" to a point about one mile southeasterly from Mt. Tabor Junction and about 3 miles northwesterly from Lents is wholly within the corporate limits of Portland.

XI.

That the right of way and track and road from Mt. Tabor Junction to Lents were first acquired and constructed by the Portland, Chicago and Mt. Scott Railway Company, a corporation whose stock was principally owned by those who lived or owned property at and between said points; and that plaintiff's predecessor acquired said stock and said right of way and track and road and railway between Mt. Tabor Junction and Lents from the said stockholders and owners under an arrangement and agreement by which, for a valuable consideration, it expressly agreed that no more than a

12 5 cent fare should be charged by plaintiff's predecessor and its successors and assigns for any ride between Lents and

Portland; and that plaintiff is bound by said arrangement and agreement, and by reason thereof cannot charge more than 5 cents for any ride on said "Mt. Scott Division" between Lents and Portland.

XII.

That said "Mt. Scott Division" was extended from Lents to Lents Junction a distance of .62 of a mile, for the benefit and accommodation of the public generally, and particularly that portion thereof residing or being on or near the "Mt. Scott Division" who would desire to go to points on the "Springwater Division" and that portion thereof residing or being on or near the "Springwater Division" would *would* desire to go to points on the "Mt. Scott Division"; and that the 5 cent fare limit on or via the "Mt. Scott Division" was and is stopped at Lents; and that plaintiff could not and cannot charge more than 5 cents for a ride over or via said "Mt. Scott Division" from Lents to Lents Junction or to points within a reasonable distance beyond said Lents Junction on the "Springwater Division."

XIII.

That because of the facts and conditions set forth in the three preceding paragraphs hereof and the situation and conditions of plaintiff's lines and traffic generally, plaintiff cannot charge for a ride from Portland to Lents Junction over the "Springwater Division" more than ten cents—that being the fare it must charge for a ride between said points on the "Mt. Scott Division"; and that it necessarily follows that plaintiff cannot charge more than ten cents for a ride on the "Springwater Division" from Portland to any point between Portland and Lents Junction, for which reasons the fare from Portland to all points between Nickum and Lents Junction is only ten cents.

XIV.

That there is considerable travel between points beyond Lents Junction on the "Springwater Division" and Lents and points between Lents and Portland on the "Mt. Scott Division", such travel transferring from one to the other division at Lents Junction; and that, if more than five cent fare was charged between Lents
13 and any and all points on the "Springwater Division" beyond Lents Junction regardless of their distances beyond Lents Junction, it would result in a division of only .62 of a mile from Lents to Lents Junction for and on which a five cent fare was charged and in unreasonable and unlawful rates from some points beyond Lents Junction to Lents; and that it therefore became necessary to create a district extending from Lents on the "Mt. Scott Division" to Gates on the "Springwater Division", a distance of 2.29 miles and to establish and apply a group rate of ten cents for the fare from Portland via Lents to each station in that district on the "Springwater Division" to-wit: Lents Junction, Gilbert and Gates,—Gates being only 1.67 miles beyond Lents Junction; and that, as it is so became necessary to establish a 10 cent rate from

Portland to Gilbert and to Gates via Lents and the "Mt. Scott Division", plaintiff had to also fix its fare from Portland to Gilbert and to Gates over the "Springwater Division" at 10 cents.

XV.

That the total distance from Portland to Cazadero over the "Springwater Division" is 37.51 miles and the fare charged by plaintiff for the ride from Portland to Cazadero is 80 cents or approximately two cents per mile; and that because of the facts set forth in the preceding paragraphs of this complaint, plaintiff cannot and does not charge more than ten cents for that portion of said ride from Portland to Cazadero which ends at Gates; and that the distance from Gates to Cazadero is 25.23 miles and the remaining 70 cents of the total fare from Portland to Cazadero should be equitably distributed over said 25.23 miles; and that, because it is not practical or convenient to collect fares on the "Springwater Division" other than in multiples of five cents, plaintiff has, for the purpose of maintaining fair and just rates throughout said division, distributed said remaining 70 cents of said 80 cent fare from Portland to Cazadero by dividing said remaining 25.23 miles of the total mileage between said points—being the distance from Gates to Cazadero—into fourteen districts and applied to all points within each district a group rate of 5 cents more than the fare to points within the next district nearer Portland, and that, as a matter of fact, these group
14 rate districts on the "Springwater Division" are approximately only 1.81 miles in length, while the group rate districts on the "Oregon City Division" are approximately 2.27 miles in length —showing that, as a whole, lesser fares are charged to intermediate points on the "Oregon City Division" than on the "Springwater Division"—the difference in this regard being due to the difference in the situation and circumstances and conditions of the two divisions as hereinbefore shown and explained; and that the first of said districts on said "Springwater Division" beyond Gates includes the stations of Wilson, Sycamore and Jenne and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction five cents less; and that the second of said districts on said "Springwater Division" beyond Gates includes the stations of Meadowbrook and Cedarville and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 20 cents and from Golf Junction five cents less; and that in like manner the group rate applied to each of said districts and the fare for and rate to each station in said district from Portland and from Golf Junction increases five cents as each district is reached on the way to Cazadero.

XVI.

That the situation of and the circumstances and conditions governing and controlling the traffic and service upon plaintiff's said "Springwater Division" and said "Mt. Scott Division" are not like or similar to or contemporaneous with the situation of and the cir-

cumstances and conditions governing and controlling the traffic and service upon plaintiff's "Oregon City Division"; and that the fares charged by plaintiff on its said "Springwater Division" and on its said "Mt. Scott Division" do not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by plaintiff on its "Oregon City Division" for the purpose of determining whether or not any of the latter are just or reasonable or justly or unjustly discriminatory.

XVII.

15 That the fares charged by plaintiff on all of its said divisions are fair and reasonable and just and in and by none of them is any provision of Chapter 53 of the Session Laws of Oregon for 1907 violated.

XVIII.

That heretofore and on the 30th day of January, 1908, the defendant rendered an order and decision which was thereafter and on the 1st day of February, 1908, served upon plaintiff, upon the application of the Oak Grove Improvement Association, by B. Lee Paget, as Relator and against this plaintiff wherein and whereby, notwithstanding all of the facts and circumstances hereinbefore set forth, the said defendant found and declared that the rates, fares and charges demanded and collected by this plaintiff of and from persons traveling in either direction between Lents and Lents Junction, and First and Alder Streets in the City of Portland on the "Mt. Scott Division" and between Nickum, Kerrigan, Bell, Kendall, Lents Junction, Gilbert and Gates and the said First and Alder Streets on the said "Springwater Division" are unjustly discriminatory against the said Oak Grove Improvement Association and the members thereof, and the relator, B. Lee Paget, who travel between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and said First and Alder Streets and that the practice of this plaintiff in issuing transfers to certain passengers on certain of plaintiff's lines of railway and the refusal of plaintiff to furnish such transfers to the said Oak Grove Improvement Association and the members thereof, and the relator, B. Lee Paget, when traveling and paying fare from Milwaukee Heights, Courtney, Oak Grove, Center and Risley over plaintiff's lines of railroad to First and Alder Street- in the City of Portland, Oregon, is unreasonable and unjustly discriminatory against the said Oak Grove Improvement Association and the members thereof, and the relator, B. Lee Paget, and also that the said fares and charges of plaintiff between the group of stations including Milwaukee Heights, Oak Grove, Center and Risley and the terminus of said railroad at First and Alder Streets in the City of Portland, to-wit: the sum of fifteen cents for a single passage in either direction, is in itself unjust and unreasonable and

16 that a just and reasonable fare and charge for the transportation of persons in either direction between said First and Alder Streets in the City of Portland and said points within the said group would be the sum of ten cents and thereupon said

defendant ordered and directed this plaintiff to cease charging the said rate of 15 cents and directed this plaintiff to charge for such transportation of each passenger the sum of ten cents only and further directed this plaintiff to afford the same transfer privileges to passengers from said group including Milwaukee Heights, Courtney, Oak Grove, Center and Risley to First and Alder Streets in the City of Portland, in either direction which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland and further require this plaintiff to observe and follow the rates and practice in regard to transfers in said order prescribed by said defendant and to make such change in said charges and said practice within thirty days from the date of the service of a certified copy of said order upon plaintiff.

XIX.

That a copy of said order of said defendant is hereunto attached marked "Exhibit A" and is hereby referred to and expressly made a part of this complaint.

XX.

That the rates, charges and practice of this plaintiff which said defendant in and by the said order declares to be unjust, unreasonable and unjustly discriminatory, are as a matter of fact, reasonable and fair and are not unjustly discriminatory in respect to said Oak Grove Improvement Association, and the members thereof, and the said Relator, B. Lee Paget, or any other persons traveling as passengers upon said "Oregon City Division" of said plaintiff's railway, or any part thereof, nor by reason of the facts, circumstances and conditions in this complaint set forth, are said rates and practices unjustly discriminatory in respect to any other persons traveling as passengers upon any other of said plaintiff's lines of railway.

XXI.

That in making the said order, findings and decisions
17 upon the application of said Oak Grove Improvement Association by B. Lee Paget, as Relator, and against this plaintiff, the said defendant has wholly ignored and disregarded the facts, circumstances and conditions and the contractual obligations of this plaintiff which have rendered necessary, proper and reasonable the establishment of the said rates hereinbefore set forth upon the said "Mt. Scott Division" and the said "Springwater Division" and because this plaintiff has been and is compelled by said facts, circumstances, conditions and contractual obligations to transport persons traveling as passengers, a greater distance upon said "Mt. Scott Division" and said "Springwater Division" for a less charge or fare than that established by this plaintiff upon said "Oregon City Division" between the said terminus at First and Alder Streets and the said group of stations including Milwaukee Heights, Courtney, Oak Grove, Center and Risley and not otherwise, said defendant has arbitrarily and unlawfully by its

said order dated January 30, 1908, required and commanded this plaintiff to reduce its just and reasonable charges and fares upon said "Oregon City Division" between said First and Alder Streets and the points upon said "Oregon City Division" last above mentioned.

XXII.

That the said rates, charges and tolls fixed and established and charged and collected by this plaintiff for persons traveling as passengers between said group of stations last above mentioned and said First and Alder Streets are reasonable and such only as, considering the volume of the traffic and the expense of maintenance and operation of plaintiff's railroads to afford a reasonable return upon plaintiff's investment in said railroad.

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XXIII.

That the rates, fares and charges to be charged and collected by this plaintiff for the transportation of passengers between the points described in the said order of the defendant, fixed in said order, are unreasonable and unlawful and that if permitted to go into effect would deprive plaintiff of a just and reasonable or any net profit or return upon the transportation of passengers traveling over the portions of said plaintiff's railroad affected by said order of said defendant, and that the regulations and practice prescribed and fixed in said order of said defendant to be followed and observed by this plaintiff, are and each of them are unreasonable.

XXIV.

That in making the said order and decision aforesaid, the said defendant has exceeded the powers conferred upon it by the Act of the Legislature of Oregon creating the said defendant and which act is known as Chapter 53 of the general laws of Oregon, Session of 1907, in that said defendant in making said order has found and based the said order upon the finding of said defendant, and that the said rates of fare charged and collected by plaintiff from different points on different and separate lines of plaintiff's railways are unjustly discriminatory against the said Oak Grove Improvement Association and the members thereof, and the Relator B. Lee Paget, who travel to said plaintiff's terminal at First and Alder Streets in Portland from other points and upon an entirely different and separate line of plaintiff's said railways.

XXV.

That to permit the said order and decision of the said defendant to go into effect would unjustly and seriously impair the revenues of this plaintiff and would result in great and irreparable damage and injury to this plaintiff.

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XXVI.

That plaintiff has no plain, speedy or adequate remedy at law.

XXVII.

That should this Honorable Court after a full hearing upon the issues raised in this cause render a decision herein enjoining the taking effect of the said order of the said defendant or any part thereof, that in the interim between the filing of this complaint and the rendering of such decree, this plaintiff would be required to charge only the rates and fares fixed in and by the said order of the said defendant and that by reason of the great number of passengers that would be transported by plaintiff on said railway between the points thereon affected by said order and by reason of the provisions of said Chapter 53 of the general laws of Oregon, Session 1907, it would be impossible for this plaintiff to recover of and from the persons traveling as passengers upon its said line of railway, affected by the said order, the said five cents per passenger which is the reduction in fare fixed by said defendant and which would result in great and irreparable damage and injury to this plaintiff.

Wherefore, plaintiff prays that a temporary restraining order be issued out of this court directed to the said defendant suspending and staying the operations of the said order of the said defendant until such time as a final hearing and determination of this cause can be had and that upon such final hearing plaintiff be granted a decree herein vacating and setting aside the said order of the said defendant; that plaintiff have such other, further or different relief as to the court may seem meet and equitable and that plaintiff have and recover of and from defendant its costs and disbursements herein.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

20 STATE OF OREGON,
County of Multnomah, ss:

I, F. I. Fuller, being first duly sworn say that I am Vice President of the Portland Railway Light and Power Company, plaintiff named in the above entitled suit, that I have read the foregoing complaint and that the same is true as I verily believe.

F. I. FULLER.

Subscribed and sworn to before me this 26th day of February, 1908.

[SEAL.]

C. A. MANEY,
Notary Public for Oregon.

21 "EXHIBIT A."

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGE, as Relator, Plaintiff,

vs.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Oregon.

Now on this 30th day of January, 1908, this matter comes on before the above named Commission for final determination and order, having heretofore been fully submitted; and the Commission having heard and examined the complaint of the plaintiff, the answer of the defendant, the evidence and proofs offered, the argument of the counsel, and being fully advised in the premises, finds:

(1) That the defendant Portland Railway, Light and Power Company is a corporation organized under and existing by virtue of the laws of the state of Oregon and own- and operates by electric power a railroad or interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, (known as the Oregon City Division) and also a line of railroad from said First and Alder Streets to Lents Junction, Multnomah County, Oregon, (known as the Mount Scott Division) and also a line of railroad easterly and southerly through Multnomah County to Cazadero in Clackamas County, Oregon, (being known as the Springwater Division) the station of Nickum being situated on said last mentioned line of railroad outside the corporate limits of the City of Portland, Oregon.

(2) That the plaintiff is a voluntary association of persons residing in and about stations on the line of the defendant known as Milwaukee Heights, Courtney, Oak Grove, Center and Risley, the same being on the Oregon City Division thereof; and that B. Lee Paget is the President of the said association and prosecutes this proceeding on its behalf.

22 (3) That the defendant makes the following charges and collects the following fares, to-wit:

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	.... 5 cents.
Lambert	5.93 "	....10 "
Knight	6.29 "	....10 "
Hendee	6.44 "	....10 "
Milwaukee	6.71 "	....10 "
Island	7.05 "	....10 "
Milwaukee Heights	7.70 "	....15 "
Courtney	8.30 "	....15 "
Oak Grove	8.48 "	....15 "
Center	8.68 "	....15 "
Risley	9.26 "	....15 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 miles	5 cents.
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35 miles	5 cents.
Nickum	6.51 "	5 "
Kerrigan	7.26 "	10 "
Bell	8.51 "	10 "
Kendall	9.32 "	10 "
Lents Junction	10.71 "	10 "
Gilbert	11.65 "	10 "
Gates	12.38 "	10 "
Wilson	13.00 "	15 "
Sycamore	13.48 "	15 "
Jenne	14.43 "	15 "

Between Golf Junction and

On Oregon City Division.

Lambert	.57 miles	5 cents.
Knight	.93 "	5 "
Hendee	1.08 "	5 "
Milwaukee	1.35 "	5 "
Island	1.69 "	5 "
Milwaukee Heights	2.34 "	10 "
Courtney	2.94 "	10 "
Oak Grove	3.12 "	10 "
Center	3.32 "	10 "
Risley	3.90 "	10 "

On Springwater Division.

Nickum	1.15 miles	5 cents.
Kerrigan	1.90 "	5 "
Bell	3.15 "	5 "
Kendall	3.96 "	5 "
Lents Junction	5.35 "	5 "
Gilbert	6.29 "	10 "
Gates	7.02 "	10 "
Wilson	7.64 "	10 "
Sycamore	8.12 "	10 "
Jenne	9.07 "	10 "

23 (4) That the said rates, fares and charges demanded and collected by the defendant of and from persons traveling in either direction between Lents and Lents Junction and First and Alder Streets in the City of Portland, on the Mount Scott Division, and between Nickum, Kerrigan, Bell, Kendall, Lents Junction,

Gilbert and Gates and the said First and Alder Streets on the Springwater Division of the defendant's railroad are unjustly discriminatory against the plaintiff association and the members thereof, and the relator, B. Lee Paget, who travel between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and said First and Alder Streets.

(5) The Commission further finds that from points on the Mount Scott Division without the City of Portland the defendant furnishes to passengers who pay fare to First and Alder Streets in the City of Portland certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the plaintiff association and the members thereof, and the Relator, B. Lee Paget, when traveling and paying fare from Milwaukee Heights, Courtney, Oak Grove, Center and Risley over the defendant's line of railroad to First and Alder Streets in the City of Portland, Oregon. The Commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory against the plaintiff association and the members thereof, and the relator, B. Lee Paget.

(6) The Commission further finds that the existing fares and charges of the defendant between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, to-wit: the sum of fifteen cents for a single passage in either direction is unjust and unreasonable, and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in the City of Portland and said points would be the sum of ten cents.

It is therefore ordered, considered and determined, that the
24 said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland Oregon, in either direction.

It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in

lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service.

The privileges and order herein are predicated upon the defendant continuing to offer to the traveling public the 20 ride commutation rates scheduled on Page 4 of its Tariff O. R. C. No. 1, and if the defendant should withdraw such commutation rates between the points covered by this order, the right is hereby reserved to the plaintiff to move for a re-hearing hereof.

Dated at Salem, Oregon, this 30th day of January, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
OSWALD WEST,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL, *Secretary.*

A true copy:
[SEAL.] GEO. O. GOODALL, *Secretary.*

And afterward, on the 27th day of February, 1908, the following

Summons

was duly filed in the office of the said clerk:

(Title.)

To Railroad Commission of Oregon, Defendant:

In the name of the State of Oregon: you are hereby required to appear and answer the complaint filed against you in the above entitled suit within ten days from the date of service of this summons upon you, if served within this County; and if you fail to answer, for want thereof, the plaintiff will apply to the court for a decree as prayed for in the complaint, vacating and setting aside that certain order made by the defendant on the 30th day of January, 1908, on the application of the Oak Grove Improvement Association by B. Lee Paget as Relator, plaintiff, and against Portland Railway Light and Power Company, defendant, and the whole thereof, which said order of the said defendant provides as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak

Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that
27 the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.";

and for such other, further or different relief as to the court may seem meet and equitable in the premises and for judgment against you for plaintiff's costs and disbursements in the said suit.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

On which summons was made the following return:

STATE OF OREGON,
County of Marion, ss:

I hereby certify that I served the within summons within the said State and County, on the 27th day of February, 1908, on the within named defendant, Railroad Commission of Oregon, by delivering a copy thereof, prepared and certified by me, as Sheriff, together with a copy of the complaint, prepared and certified to by Franklin T. Griffith, one of plaintiff's attorneys, to Geo. O. Goodall, Secretary of said Railroad Commission.

W. J. CULVER,
Sheriff of Marion County, State of Oregon,
By H. P. MINTO, *Dep'ty.*

28 And afterward, on the 28th day of February, 1908, there was duly made and entered of record, an

Order Direction Notice of Hearing on Application for Injunction

in words and figures as follows:

(Title.)

Plaintiff in the above entitled cause having presented herein its motion supported by affidavit and based upon said affidavit and the pleadings on file herein and having moved the court for an order setting a time for the hearing of plaintiff's application to the court for the issuance in said cause of a temporary or preliminary injunction as prayed for in the said complaint.

It is ordered that Monday, the second day of March, 1908, at the hour of one o'clock, P. M. of said day, at the courtroom of this court in Salem, in said Marion County, be and the same is hereby fixed as the time and place for hearing plaintiff's said application for a temporary injunction, and the defendant is directed to be and appear at said time and place to make such counter showing it may wish to make in the premises, and show cause why an injunction should not be issued suspending and staying the order of the defendant, dated the 30th day of January, 1908, which is as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center
29 and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded to passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this

order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

It is further ordered that plaintiff serve a copy of this order upon the defendant, together with a copy of plaintiff's said motion and the affidavit in support thereof which it may desire to present at said hearing, and that said service be made at least two days prior to said second day of March, 1908, and that at the time or prior to the said time set for hearing of said application the said defendant serve upon plaintiff or its attorneys any counter affidavits it may desire to present to the said application.

WM. GALLOWAY, *Judge.*

Dated Feb. 27, 1908.

30 And afterward, on the 2d day of March, 1908, there was duly filed in the office of the said clerk, a

Motion for Temporary Injunction and Order Fixing Time of Hearing,

in words and figures as follows, viz:

(Title.)

To Railroad Commission of Oregon, defendant above named:

Take notice that the above named plaintiff will, on Monday, the second day of March, 1908, at the hour of one o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, will present the hereunto attached motion and will move the above entitled court for a temporary injunction as prayed for therein.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

It is hereby ordered that the foregoing notice be served upon the defendant not less than two days prior to the said second day of March, 1908.

WM. GALLOWAY,
Judge of the Circuit Court of the State of Oregon for the County of Marion.

31 *Motion.*

(Title.)

Comes now the plaintiff above named by Frederick V. Holman and Franklin T. Griffith, its attorneys and, based upon the affidavit of F. I. Fuller hereunto attached and the complaint of plaintiff on file herein, moves the court to grant a temporary injunction herein

suspending and staying the operation of that certain order and decision of the defendant dated the 30th day of January, 1908, and fully set forth and described in plaintiff's complaint and the whole thereof until the final determination of the above entitled cause.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

To which was attached the following

Affidavit.

(Title.)

STATE OF OREGON,
County of Multnomah, ss:

I, F. I. Fuller, being first duly sworn, say that I am Vice President of Portland Railway Light and Power Company, plaintiff in the above entitled suit; that heretofore and on the 30th day of January, 1908, the defendant made and thereafter served upon the said plaintiff a certain order and decision of said defendant commanding and requiring this plaintiff, within thirty days from the service of said order upon this plaintiff, to reduce the rates of fare charged and collected by this plaintiff from persons traveling as passengers upon the line of railway of this plaintiff known as plaintiff's Oregon City Division, which order and decision commands and requires this plaintiff, after the expiration of said thirty days, to charge and collect a fare of — cents only from each person traveling as a passenger upon this plaintiff's said Oregon City Division between stations on said division known as Milwaukee Heights, Courtney, Oak Grove, Center and Risley to — the terminus of
32 plaintiff's Oregon City Division of railway at First and Alder Streets in the City of Portland, Oregon, whereas the rates of fare heretofore and now charged and collected by this plaintiff of and from persons traveling as passengers upon said Oregon City Division between the said points has been and is the sum of fifteen cents.

That said order and decision of said defendant further requires and commands this plaintiff, within said period of thirty days, to furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

That this plaintiff has commenced in the above entitled court a suit against the said defendant for the purpose of setting aside and vacating the said order and decision of the said defendant for the reasons and upon the grounds that the said order and decision is unlawful and unreasonable as fully set forth in plaintiff's said complaint.

That the said order and decision of the said defendant was served upon this plaintiff on the 1st day of February, 1908, and, unless

stayed and suspended by order of this Honorable Court, will go into effect on the 2d day of March, 1908.

That should the said order and decision of the said defendant be permitted to go into effect the said plaintiff will thereafter and until the final determination of the said suit be required to reduce its charges for said transportation and will be required to issue the said transfers as required by the said order and decision, and that should the said order and decision, at the final hearing of the said suit, be vacated and set aside this plaintiff will be unable to recover of and from the persons traveling as passengers upon its said line of railroad and paying said reduced fare, the additional fare to which plaintiff is entitled, and that all of such additional fare would be wholly lost to said plaintiff to its great and irreparable damage and injury.

That it is provided by Chapter 53 of the General Laws of Oregon, Session 1907, that should a temporary injunction be issued
33 suspending or staying the operation of any such order of the said defendant that all persons traveling as passengers upon plaintiff's line of railway during the pendency of such suit and the continuance of such temporary injunction can recover in an action at law, as in Chapter 53 provided, the excess fare so paid and that no damage or injury would be sustained by any of such persons traveling as such passengers by reason of such temporary injunction.

F. I. FULLER.

Subscribed and sworn to before me this 26th day of February, 1908.

[SEAL.] C. A. MANEY,
Notary Public for Oregon.

34 To which Motion and Affidavit the following

Order of Court

was duly attached, viz:

(Title.)

Plaintiff in the above entitled cause having presented herein its motion supported by affidavit and based upon said affidavit and the pleadings on file herein and having moved the court for an order setting a time for the hearing of plaintiff's application to the court for the issuance in said cause of a temporary or preliminary injunction as prayed for in the said complaint.

It is ordered that Monday, the second day of March, 1908, at the hour of one o'clock P. M. of said day, at the courtroom of this court in Salem, in said Marion County, be and the same is hereby fixed as the time and place for hearing plaintiff's said application for a temporary injunction, and the defendant is directed to be and appear at said time and place to make such counter showing it may wish to make in the premises, and to show cause why an injunction should not be issued suspending and staying the order of the defendant, dated the 30th day of January, 1908, which is as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and
35 Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered, and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

It is further ordered that plaintiff serve a copy of this order upon the defendant, together with a copy of plaintiff's said motion and the affidavit in support thereof which it may desire to present at said hearing, and that said service be made at least two days prior to said second day of March, 1908, and that at the time or prior to the said time set for hearing of said application the said defendant serve upon plaintiff or its attorneys any counter affidavits it may desire to present to the said application.

WM. GALLOWAY, *Judge.*

STATE OF OREGON,
County of Marion, ss:

Due service of the within order, motion and affidavit is hereby accepted in Marion County, Oregon, this 28 day of February, 1908, by receiving a copy thereof, duly certified to as such by Franklin T. Griffith of attorneys for plaintiff.

RAILROAD COMMISSION OF OREGON,
By CLYDE B. AITCHISON, *Commissioner.*

36 And afterward, on the 2d day of March, 1908, the defendant duly filed with the said clerk, an

Answer

in words and figures as follows:

(Title.)

Now comes the defendant above named and for answer to the complaint of the plaintiff herein, admits, denies, and alleges as follows:

First. Denies each and every allegation of the complaint except as hereinafter expressly admitted.

Second. Admits all of paragraph 1 of the complaint, except the allegation that plaintiff is or has been engaged in operating street railways within the City of Portland and railroads without the City of Portland between the termini set out in subparagraphs lettered "a, b, c, and d," of said paragraph 1; and defendant alleges that the plaintiff, at the time set out in said paragraph 1, was and is engaged in the operation of one continuous system of electric railways, carrying freight, passengers, and express between the termini set out in said paragraph.

Third. Admits that the plaintiff established certain rates of fare for the transportation of persons upon its lines of railway and between the different points on its railway and its terminus, at First and Alder Streets in the City of Portland and between Golf Junction to the places and points named in paragraph 2, and that the rates, fares, and charges established by the plaintiff are set out in said paragraph 2, and that the distances set out in said paragraph 2 are substantially correct, but this defendant denies that the rates, fares and charges so established by the plaintiff are the reasonable rates of fare for the transportation of persons traveling between said points; and this defendant especially denies that the rate of fare established and charged between First and Alder Streets in the City of Portland and Oak Grove and other places and points, to wit: fifteen cents, is a reasonable rate of fare or charge, and alleges that no greater fare than ten cents is a reasonable rate, fare or charge between said points for the transportation of persons traveling as passengers upon plaintiff's said railway lines.

37 Fourth. Admits all of paragraph 3 of the complaint.

Fifth. Admits the allegation in paragraph 4 of the complaint alleging that the City of Portland has a population exceeding fifty thousand inhabitants.

Sixth. Admits all of paragraph 5 of said complaint.

Seventh. Admits that the fares charged by the plaintiff are set out in paragraph 6 of the complaint, but the defendant specifically denies that it is not practicable or convenient to collect fares on said Oregon City Division other than in multiples of five cents, and alleges that on the contrary, it is practicable and convenient to collect fares on said division in multiples of one cent, or any number of cents.

Eighth. Admits that the plaintiff has established commutation rates and established commutation books, as alleged in paragraph 7 of the complaint, but the defendant alleges that no transfers are given to persons riding upon or using said commutation rates for coupons.

Ninth. Admits the allegations of paragraph 8 of the complaint, except that on a trip to or in the direction of Oregon City, its cars thereon are out of Portland after leaving Golf Junction, and that plaintiff's Springwater division proceeds in an easterly direction from Golf Junction and on a trip to or in the direction of Cazadero the cars of said division run in the corporate limits of Portland for nearly a mile after leaving Golf Junction and on the contrary alleges that they only run in the corporate limits for three thousand and thirty-seven (3037) feet, and admits that the station of Nickum is the first station on said Springwater division east of Golf Junction, but denies that it was only about one-half mile east of the eastern boundary of Portland, and on the contrary alleges that it is three thousand and sixty (3060) feet east of the eastern boundary of the City of Portland, and defendant expressly denies that passengers are entitled to and can insist on being carried to the boundary of Portland for five cents from Nickum, or that it would be decidedly inconvenient or unnecessarily expensive, or to the detriment of the service for plaintiff to stop all or any of its trains at said boundary.

38 Tenth. Admits all of paragraph 10 of the complaint.

Eleventh. Admits all of paragraph 11 of the complaint, and affirmatively alleges that the traffic on said Portland-Chicago and Mt. Scott Railway Company's line has so increased that the plaintiff has voluntarily increased the number of trains or cars required in said contract mentioned by the plaintiff in said paragraph from twelve to about fifty cars per day each way, and such increase of trains and cars has been voluntarily made by plaintiff to accommodate the increased traffic upon said portions of the plaintiff's line.

Twelfth. Admits that the fare charged by the plaintiff for the ride from Portland to Cazadero is eighty cents, and that the distances from Portland to Cazadero and from Gates to Cazadero are as alleged in paragraph 15 of the complaint.

Thirteenth. Admits all of paragraph- 18 and 19 of the complaint, including order 94, marked "Exhibit A" and attached to said complaint.

Fourteenth. Admits that on the 30th day of January, 1908, it made the order mentioned in paragraph 21 of said complaint, but denies each and every other allegation thereof, and alleges that in making said order, it made the same upon application of the Oak Grove Improvement Association, by B. Lee Pager, as relator, and that it proceeded as required by the provisions of chapter 53, laws of Oregon for 1907, and that testimony was produced by each party thereto, including the plaintiff herein, and all of the testimony produced by both parties was duly considered and acted upon in making said order, and as required by the provisions of this act, this defendant now causes a certified transcript of all the

proceedings had and testimony taken upon such investigation to be filed herewith with the clerk of this court.

Defendant, further answering the complaint herein, alleges:

First. That instead of unjustly or seriously or at all impairing the revenues of this plaintiff, as alleged in paragraphs 25 and
39 27 of the complaint, that if the said order of defendant is permitted to stand, it will materially add to the revenues of the plaintiff, by reason of increased travel, which would be greatly stimulated by the reduction in fares and the giving of transfers.

Second. That the order of the defendant, set out in plaintiff's complaint and sought to be set aside and suspended herein, is in all respects just and reasonable.

Wherefore, defendant prays that this suit be dismissed, and for costs and disbursements herein.

A. M. CRAWFORD,
Attorney General, and
CLYDE B. AITCHISON,
Attorneys for Defendant.

STATE OF OREGON,
County of Marion, ss:

I, Thomas K. Campbell, being first duly sworn, say that I am Chairman of the Railroad Commission of Oregon in the above entitled cause, and that the facts set forth in the foregoing answer are true, as I verily believe.

THOS. K. CAMPBELL.

Subscribed and sworn to before me this 29th day of February, 1908.

[SEAL.] I. H. VAN WINKLE,
Notary Public for Oregon.

STATE OF OREGON,
County of Marion, ss:

Due and legal service of the within answer by the receipt of a copy thereof duly prepared and certified by A. M. Crawford, one of the attorneys for defendant, is hereby admitted in said County and State, this 2d day of March, 1908.

FRANKLIN T. GRIFFITH,
Of Attorneys for Plaintiff.

40 And afterward, on the 2d day of March, 1908, there was duly filed in the office of the said clerk, an

Appearance Against Motion for Preliminary Injunction

in words and figures as follows:

(Title.)

Now comes the defendant above named and opposes the motion for temporary injunction herein, for the following reasons:

First. That the complaint does not set forth facts sufficient to show that the order or decree appealed from was procured through fraud, surprise, or mistake or by any fault of the opposite party, and shows said order to have been issued by the defendant after a trial, duly had between the plaintiff herein and the Oak Grove Improvement Association, by B. Lee Paget, as relator, or that said order is unlawful, unjust, or unreasonable.

Second. That neither the complaint nor the affidavits filed by plaintiff disclose any facts which call for the issuance of a preliminary injunction.

Third. That the pleadings taken together, show that the plaintiff is estopped from demanding a preliminary injunction.

Fourth. That all alleged equities in the complaint are denied by the answer.

Dated this 2d day of March, 1908.

A. M. CRAWFORD, *Att'y General and*
CLYDE B. AITCHISON AND GILTNER &
SEWALL, *Attorneys for Defendant.*

STATE OF OREGON,
County of Marion, ss:

Due and legal service of the within notice of appearance by the receipt of a copy thereof duly prepared and certified by A. M. Crawford, one of the attorneys for defendant, is hereby admitted in said County and State, this 2d day of March, 1908.

FRANKLIN T. GRIFFITH,
Of Attorneys for Pl'ff.

41 And afterwards, on the 3d day of March, 1908, the following

Order on Injunction

was duly allowed by the court:

(Title.)

This matter coming on to be heard this second day of March, 1908, plaintiff appearing by Franklin T. Griffith, Esq., counsel, and the defendant appearing by A. M. Crawford, Attorney General, Giltner and Sewall and C. B. Aitchison, its attorneys, and the Court having heard the motion of plaintiff for a temporary injunction herein and the argument of counsel for the parties and being satisfied from the affidavits presented on behalf of the plaintiff and the pleadings in said cause that the said motion for a temporary injunction should be allowed,

Now, therefore, it is ordered, that said motion for a temporary injunction be and the same is hereby allowed and that the operation of the order of said defendant dated the 30th day of January, 1908, wherein said defendant ordered and required the said plaintiff to

desist in certain practices and to put in effect certain rates in said order specified, which are as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, the rates, fares and charges set out in its Tariff O. R. C. No. 1 viz: fifteen cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City
42 of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendan*d* shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

be stayed and suspended until the final determination of this cause herein upon condition that the said plaintiff shall make and execute a bond herein in the sum of Five Thousand Dollars as by law required in favor of said Railroad Commission of Oregon for the benefit of whom it may concern in accordance with the statute in such case made and provided, to be approved by this court.

And it is further ordered that from and after filing and the approval of said bond as aforesaid the operation of said order of the said Commission be and the same is hereby suspended and stayed until the final determination of the said cause in this court.

And it is further ordered that within five days from the date hereof the said Portland Railway Light and Power Company shall commence and thereafter continue during the term of said temporary injunction to issue to each person traveling as a passenger upon its said Oregon City Division between the stations of Milwaukee
43 Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either

direction and paying a cash fare therefor of fifteen cents, a receipt or other evidence to the effect that five cents of said fifteen cents cash fare is paid by such person or passenger subject to repayment to such person or passenger by said Portland Railway Light and Power Company should it be determined in this cause that said temporary injunction has been wrongfully issued.

Dated this second day of March, 1908.

WM. GALLOWAY, *Judge.*

43½ And afterward, on the 3d day of March, 1908, the said plaintiff duly filed with the said clerk, its

Undertaking on Injunction

in words and figures as follows:

(Title.)

Whereas, the above named plaintiff has commenced a suit in the Circuit Court of the State of Oregon in and for Marion County, against the above named defendant and is about to apply for an injunction in said suit against said defendant enjoining and restraining it from the commission of certain acts, as in the complaint filed in the said suit, is more particularly set forth and described, and suspended and staying that certain order of said defendant dated the 30th day of January, wherein said defendant ordered and directed said plaintiff as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder

44 Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future

in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this company as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service."

Now, therefore, we, Portland Railway Light and Power Company as principal, and American Surety Company of New York as surety in consideration of the premises, and of the issuing of said injunction do jointly and severally undertake and promise the Railroad Commission of Oregon, for the benefit of whom it may concern, to the effect that in case said injunction shall issue, the said plaintiff shall pay all costs and disbursements that may be decreed to the defendant and also the said Portland Railway Light and Power Company shall answer for all damages caused by the delay in the enforcement of the said order of the defendant and all penalties that would attach against the said Portland Railway Light and Power Company and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the said defendant had not been suspended during the period transpiring from the issuance of said injunction until the final determination of the questions litigated in said suit not exceeding the sum of Five Thousand Dollars as it or they may sustain by reason of the said injunction, if the same be wrongfully — or without sufficient cause.

Dated this 2d day of March, 1908.

PORTLAND RAILWAY LIGHT AND POWER COMPANY,

45 By FRANKLIN T. GRIFFITH,
Its Attorney.

AMERICAN SURETY COMPANY OF NEW YORK,

By HOMER H. SMITH,

[SEAL.] *Resident Vice President.*

Attest:
CAREY F. MARTIN,
Resident Ass't Secretary.

STATE OF OREGON,
County of Marion, ss:

Due service of the within undertaking is hereby admitted in said County and State this 2d day of March, 1908, by receiving a copy thereof duly certified as such by Franklin T. Griffith, of attorneys for plaintiff.

A. M. CRAWFORD,
Attorney for Defendant.

Approved: March 2, 1908.
WM. GALLOWAY, *Judge.*

46 And afterward, on the 22d day of June, 1908, the Court duly rendered its

Findings of Fact and Conclusions of Law

(Title.)

This suit was regularly tried before the court, and it was stipulated by and between the respective attorneys herein that the two cases, one known as the "Milwaukee Case," Number 8962, and one known as the "Oak Grove Case, Number 8963, both entitled as aforesaid, should be tried together, and that the testimony so taken shall be used and considered in both cases; and that the testimony taken in both cases before the Railroad Commission of Oregon should be used and considered in both of the said suits, so far as applicable, and subject to objections.

Frederick V. Holman and Franklin T. Griffith appeared as attorneys for the plaintiff, and Hon. A. M. Crawford, Attorney General of the State of Oregon, Clyde B. Aitchison, and Giltner and Sewall appeared as attorneys for the defendant in the above entitled suit.

Additional evidence to that taken before the said Commission was taken in both cases in the above entitled suit. After the conclusion of the testimony, pursuant to an order of the Court, duly made and entered, the said testimony was referred back to the said Commission for further consideration, pursuant to the provisions of Section 34 of Chapter 53 of the laws of Oregon for the year 1907. Thereafter, as provided by law, the said Commission, after considering all the evidence in this suit and the argument of the respective counsel, amended its former order and returned the same together with the transcript of the evidence, papers and exhibits, to this Court.

After hearing all the evidence in this suit, the arguments of the respective counsel, and being fully advised in the premises, now at this time the Court makes these, its Findings of Fact and Conclusions of Law, and files the same in this court.

Findings of Fact.

1.

47 That the plaintiff Portland Railway Light & Power Company is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and owns and operates by electric power a suburban and interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, known as the "Oregon City Division," and also a line of railroad from said First and Alder Streets to Lents and Lents Junction, Multnomah County, Oregon, known as the "Mount Scott Division," and also a

line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Nickum, Gates and Cazadero, in Clackamas County, Oregon, said Nickum, Gates and Lents being points outside of the City of Portland, Oregon.

2.

That the defendant is the duly appointed, organized and acting Railroad Commission of Oregon, under the provisions of Chapter 53 of the Laws of Oregon for the year 1907.

3.

That the Oak Grove Improvement Association is a voluntary association organized under the laws of the State of Oregon, and that B. Lee Paget it is president. That Oak Grove, Courtney, Center and Risley are unincorporated communities, situated along the line of plaintiff's Oregon City Division, aforesaid.

That the town of Milwaukee is a municipal corporation of the State of Oregon, and is situated on said Oregon City Division, between the communities first named in this finding and First and Alder Streets in the City of Portland. That the said communities of Oak Grove, Courtney, Center and Risley will for convenience be hereafter designated as the Oak Grove District.

4.

That the Portland Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

That its street cars are operated by electric power within the
48 City of Portland and to the City of St. Johns, Multnomah County, Oregon, and that it is a common carrier. That a majority of the capital stock of the said Portland Railway Company is owned by the plaintiff herein; and that the said Portland Railway Company and the plaintiff herein are operated under a common management.

5.

That plaintiff has established rates of fare for the transportation of persons traveling as passengers *traveling* upon its said line of railway and between different points upon its said railways and its said terminus at First and Alder Streets in said City of Portland, and between Golf Junction and the places and points named below, the following rates, fares and charges being those so established and the distances being as given below:

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	5	cents.
Lambert	5.93 "	10	"
Knight	6.29 "	10	"
Hendee	6.44 "	10	"
Milwaukee	6.71 "	10	"
Island	7.05 "	10	"
Milwaukee Heights	7.70 "	15	"
Courtney	8.30 "	15	"
Oak Grove	8.48 "	15	"
Center	8.68 "	15	"
Risley	9.26 "	15	"
Oregon City	14.47 "	25	"
Canemah	15.47 "	25	"

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 "	5	"
Lents	7.69 "	5	"
Lents Junction	8.31 "	10	"

On Springwater Division.

Golf Junction (within City of Portland)	5.35 "	5	"
Nickum	6.51 "	5	"
Kerrigan	7.26 "	10	"
Bell	8.51 "	10	"
Kendall	9.32 "	10	"
Lents Junction	10.71 "	10	"
Gilbert	11.65 "	10	"
Gates	12.38 "	10	"
Wilson	13.00 "	15	"
Sycamore	13.48 "	15	"
Jenne	14.42 "	15	"

49 Between Golf Junction and

On Oregon City Division.

Lambert	.57 miles	5	cents.
Knight	.93 "	5	"
Hendee	1.08 "	5	"
Milwaukee	1.35 "	5	"
Island	1.69 "	5	"
Milwaukee Heights	2.34 "	10	"
Courtney	2.94 "	10	"
Oak Grove	3.12 "	10	"
Center	3.32 "	10	"
Risley	3.90 "	10	"
Oregon City	9.21 "	20	"
Canemah	10.21 "	20	"

On Springwater Division.

Nickum	1.15	"	5	"
Kerrigan	1.90	"	5	"
Bell	3.15	"	5	"
Kendall	3.96	"	5	"
Lents Junction	5.35	"	5	"
Gilbert	6.29	"	10	"
Gates	7.02	"	10	"
Wilson	7.64	"	10	"
Sycamore	8.12	"	10	"
Jenne	9.07	"	10	"

6.

That the distance between Lents and the limits of the City of Portland on said plaintiff's line of railroad is 3.50 miles. That the station of Hazelwild, on plaintiff's said Mt. Scott line, is a mile and one half from Lents, and two miles outside the limits of the City of Portland. That the distance on the line of the said Portland Railway Company from the terminus of said Company near First and Alder Streets in the said City of Portland, to the terminus in the City of St. Johns, Oregon, is to-wit: nine miles. The distance from the said terminus in the City of Portland, Oregon, to the city limits of the said city of St. Johns is about seven miles, and from there to the terminus in the said City of St. Johns proper is about two miles.

7.

That the aforesaid places are suburbs of the City of Portland.

8.

That plaintiff's predecessor acquired about four miles of track and right of way which extended between Mt. Tabor Junction and Lents, on the 13th day of April, 1901, by and pursuant to an agreement wherein and whereby it was agreed in consideration
50 thereof that not more than a five cent fare should be charged by plaintiff's said predecessor, its successors and assigns, for any ride between Lents and the City of Portland, and that in making its charge of fice cents between Lents and the City of Portland, the plaintiff is carrying out said agreement. The said track and right of way are facilities, among other facilities, used by the plaintiff in the transportation of passengers between Lents and Portland.

9.

That before and at the time said Lents contract was entered into, the population of the territory contiguous to said railroad was small. That now the population of said territory is about 10,000; and the value of real estate in Lents and said territory has increased rapidly. That the said increase in population and land values has been and is due in a great measure to the fact that the plaintiff has charged and is charging but five cents for transportation of pas-

sengers between First and Alder Streets in the City of Portland, and Lents, and intermediate points.

10.

That at all times since said Lents contract was entered into the plaintiff and its predecessor companies charged fifteen cents for the transportation of passengers between First and Alder Streets in the City of Portland and the Oak Grove District. That at the time said Lents contract was entered into the territory between and including Risley and Milwaukee had a population of about 2,000; that at the date of said Lents contract said Oak Grove District was growing in population and real estate was increasing in value; that when plaintiff's Springwater division was opened for traffic and the plaintiff fixed its rates of fare to Nickum at five cents, and to all stations from Kerrigan to Gates inclusive at ten cents; that since the said fare of fice cents between Lents and Portland has been in operation and the said fare of five cents from Nickum to Portland and ten cents from Kerrigan to Gates inclusive has been in operation the said rates have been lower than the fares charged to stations in the Oak Grove district aforesaid, and that the
51 effect thereof has been to cause the said Lents and Lents territory to increase in population as aforesaid, and the said land values in said Lents and Lents territory to increase in value as aforesaid, and the growth and population of said Oak Grove district has thereby been stagnated and its business, since such lower fare to said other communities were established has not appreciably increased.

11.

That by reason of the fact that the inhabitants of the Oak Grove district are charged greater fares than the fares charged the inhabitants of Lents, Nickum and stations from Kerrigan to Gates inclusive for transportation between their respective residences and the City of Portland, the inhabitants of the Oak Grove District have paid to the plaintiff large sums of money in the aggregate for transportation from the Oak Grove District in excess of the charges made inhabitants of Lents, Nickum, Kerrigan and Gates, for transportation from said stations to First and Alder Streets in the City of Portland, to the great injury of the said inhabitants of the Oak Grove District; and that a just and reasonable rate, not discriminatory, to be charged persons traveling between First and Alder Streets in the City of Portland and the town of Oak Grove, Oregon, is ten cents.

12.

That the bulk of the inhabitants of the Oak Grove District are employed in the City of Portland, and go to and from their homes on the lines of plaintiff's said railroad to work mornings and evenings daily.

13.

That the population and territory between the stations of Kerrigan and Gates aforesaid, on the plaintiff's Springwater division, are

substantially the same as the territory and population in the Oak Grove District aforesaid; that the conditions and circum-
52 stances under which the plaintiff transports passengers between First and Alder Streets in the said City of Portland and the stations on its Springwater Division from Kerrigan to Gates inclusive are substantially the same as the circumstances and conditions under which the plaintiff transports passengers from said First and Alder Streets to the stations in the Oak Grove district, except as to the rate of fare charged, and the giving of transfer privileges as hereinafter set forth, which fares and transfer privileges are in favor of the inhabitants of the territory from Kerrigan to Gates.

14.

That the tariff on the plaintiff's Springwater division between the stations of Kerrigan to Gates inclusively, and First and Alder Streets, is not as great as the traffic between the stations in the Oak Grove District at said First and Alder Streets. That the plaintiff operates but seven trains per day over its Springwater division through Gates and Kerrigan in either direction.

15.

That from points on the Mt. Scott Division without the City of Portland, and Nickum on the Springwater Division, and other points on said division, the plaintiff furnishes to passengers who pay fare to First and Alder Streets in the City of Portland, transfers, entitling the holder thereof to transportation over the lines of the street railway of said Portland Railway Company in the City of Portland, and the City of St. Johns, and that such transfers are not furnished to the citizens of the Oak Grove District, traveling and paying fare from the Oak Grove District to said First and Alder Streets.

53

16.

That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City Division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. Scott Divisions, the charges of the plaintiff for the transportation of passengers between said First and Alder Streets and the Oak Grove District are unjust and unreasonable, discriminatory and give undue preference.

17.

That the evidence is not sufficient to show the value of the property of the plaintiff used in the operation of its road or the value of any of the divisions thereof, heretofore mentioned; and that the evidence does not show the income, or expenditures, or profits or loss if any, from the operation of the respective divisions of the plaintiff's line above mentioned, or the cost of transporting passengers upon any of such divisions.

18.

That because the evidence does not disclose the length of haul of any of the passengers transported by the plaintiff, and because the track between Golf Junction and First and Alder Streets is used in common by several divisions of the plaintiff's line, the Court is therefore unable to find from the evidence the traffic density to or from stations in the Oak Grove district, or on the Oregon City Division or on any of the plaintiff's other divisions.

19.

That on to-wit: January 30th, 1908, the defendant, after
54 due notice and full hearing, made and entered, and caused to be served upon the plaintiff, the certain order and findings set out as "Exhibit A" attached to the plaintiffs complaint. That upon the resubmission of the said matter to the said defendant, as aforesaid, the said defendant made a certain amendment to the said order, and returned the same into this court, and that the same is now on file herein. That the defendant has caused to be filed in this court a certified transcript of all its proceedings leading up to and including its said order and amendment. That the said order, amendment and transcript are hereby made a part of these findings.

Conclusions of Law.

1. That the equities of this suit are with the defendant, and that the plaintiff's complaint should be dismissed.

2. That the practice of the plaintiff in charging, demanding and collecting of and from passengers traveling in either direction between Oak Grove, Courtney, Center and Risley, and First and Alder Streets in the City of Portland, the sum of fifteen cents, while charging passengers traveling in either direction between said First and Alder Streets and Nickum, Kerrigan, Lents, Lents Junction, Bell, Gilbert and Gates the rates of fare hereinbefore set out, are unjustly discriminatory and unjustly preferential as against the inhabitants of the said Oak Grove District, and the locality thereof, and against persons who travel between said Oak Grove District and First and Alder Streets, aforesaid.

3. That the practice of the plaintiff in furnishing to passengers who travel from points on the Mount Scott Division without the City of Portland, to First and Alder Streets in the City of Portland, transfers entitling the said passenger to transportation over the lines of the Portland Railway Company, and in not furnishing the travelers who pay fare from the Oak Grove District to said First and Alder Streets similar transfers, is unreasonable, unjustly discrimina-
tory and unjustly preferential as against the inhabitants of
55 the Oak Grove District, the locality of the Oak Grove District, and persons traveling from First and Alder Streets to the Oak Grove District in either direction.

4. That the existing fare and charge made by the plaintiff for the transportation of passengers between Oak Grove, Courtney, Cen-

ter and Risley and First and Alder Streets in the City of Portland, to-wit: fifteen cents, is unjust and unreasonable, and that a just and reasonable charge for such transportation is ten (10) cents.

5. That the Lents contract relied upon by the plaintiff as justifying the discriminations aforesaid, is not a sufficient excuse or justification for the aforesaid discriminations and preferences against the locality of the Oak Grove District, the inhabitants thereof, and passengers traveling over plaintiff's line between Oak Grove District and First and Alder Streets. That the subject matter of said contract constitutes a part of the facilities incident to the transportation of passengers from the Oak Grove District to First and Alder Streets aforesaid, and the enforcement thereof is in violation of the provisions of Chapter 53, Laws of Oregon for the year 1907, is against public policy and is illegal and void.

6. That the amended order of the defendant complained of is reasonable, just, valid and lawful in all respects.

7. That the defendant should recover of and from the plaintiff the costs and disbursements of this suit.

Dated at Salem, Oregon, this 22d day of June, 1908.

WM. GALLOWAY, *Judge.*

56 That thereafter, and on the said 22d day of June, 1908, the following

Decree

was duly made and entered of record, viz:

(Title.)

Based upon the foregoing findings of fact and conclusions of law and the pleadings and evidence in this cause, the plaintiff appearing by Franklin T. Griffith and Frederick V. Holman, its attorneys, and the defendant appearing by R. R. Giltner, C. B. Aitchison and A. M. Crawford, its attorneys, and the Court being fully advised in the premises, it is considered, adjudged and decreed that the modified order of defendant, being order No. 94, be and the same is hereby adjudged and decreed to be in all things and respects just and reasonable and in accordance with law and in full legal force and effect, and that plaintiff be and hereby is adjudged and decreed in all matters, things and transactions affected thereby, to obey the same in all its terms and conditions and in accordance with the intent and spirit thereof. Said amended order is in words and figures as follows, to-wit:

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,

vs.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Order.

57 Now on this 30th day of January, 1908, this matter comes on before the above named Commission for final determination and order, having heretofore been fully submitted; and the Commission having heard and examined the complaint of the plaintiff, the answer of the defendant, the evidence and proofs offered, the arguments of the counsel, and being fully advised in the premises, finds:

(1) That the defendant Portland Railway, Light and Power Company is a corporation organized under and existing by virtue of the laws of the State of Oregon and owns and operates by electric power a railroad or interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, (known as the Oregon City Division) and also a line of railroad from said First and Alder Streets to Lents Junction, Multnomah County, Oregon, (known as the Mount Scott Division) and also a line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Cazadero in Clackamas County, Oregon, (being known as the Springwater Division) the station of Nickum being situated on said last mentioned line of railroad outside the corporate limits of the City of Portland, Oregon.

(2) That the plaintiff is a voluntary association of persons residing in and about stations on the lines of the defendant known as Milwaukee Heights, Courtney, Oak Grove, Center and Risley, the same being on the Oregon City Division thereof; and that B. Lee Paget is the President of the said association and prosecutes this proceeding on its behalf.

(3) That the said defendant makes the following charges and collects the following fares, to-wit:

58 Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	5 cents.
Lambert	5.93 "	10 "
Knight	6.29 "	10 "
Hendee	6.44 "	10 "
Milwaukee	6.71 "	10 "
Island	7.05 "	10 "
Milwaukee Heights	7.70 "	15 "
Courtney	8.30 "	15 "
Oak Grove	8.48 "	15 "
Center	8.68 "	15 "
Risley	9.26 "	15 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 "	5 "
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35 "	5 "
Nickum	6.51 "	5 "
Kerrigan	7.26 "	10 "
Bell	8.51 "	10 "
Kendall	9.32 "	10 "
Lents Junction	10.71 "	10 "
Gilbert	11.65 "	10 "
Gates	12.38 "	10 "
Wilson	13.00 "	15 "
Sycamore	13.48 "	15 "
Jenne	14.43 "	15 "

Between Golf Junction and

On Oregon City Division.

Lambert	.57 "	5 "
Knight	.93 "	5 "
Hendee	1.08 "	5 "
Milwaukee	1.35 "	5 "
Island	1.69 "	5 "
Milwaukee Heights	2.34 "	10 "
Courtney	2.94 "	10 "
Oak Grove	3.12 "	10 "
Center	3.32 "	10 "
Risley	3.90 "	10 "

On Springwater Division.

Nickum	1.15	"	.... 5 "
Kerrigan	1.90	"	.... 5 "
Bell	3.15	"	.... 5 "
Kendall	3.96	"	.... 5 "
Lents Junction	5.35	"	.... 5 "
Gilbert	6.29	"	....10 "
Gates	7.02	"	....10 "
Wilson	7.64	"	....10 "
Sycamore	8.12	"	....10 "
Jenne	9.07	"	....10 "

(4) That the said rates, fares and charges demanded and
59 collected by the defendant of and from persons traveling in either direction between Lents and Lents Junction and First and Alder Streets in the City of Portland, on the Mount Scott Division, and between Nickum, Kerrigan, Bell, Kendall, Lents Junction, Gilbert and Gates and said First and Alder Streets on the Springwater Division of the defendant's railroad are unjustly discriminatory against the plaintiff association and the members thereof, and the relator B. Lee Paget, who travel between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and said First and Alder Streets.

(5) The Commission further finds that from points on the Mount Scott Division without the City of Portland the defendant furnishes to passengers who pay fare to First and Alder Streets in the City of Portland certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the plaintiff association and the members thereof, and the relator, B. Lee Paget, when traveling and paying fare from Milwaukee Heights, Courtney, Oak Grove, Center and Risley over the defendant's line of railroad to First and Alder Streets in the City of Portland, Oregon. The Commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory against the plaintiff association and the members thereof, and the relator, B. Lee Paget.

(6) The Commission further finds that the existing fares and charges of the defendant between Milwaukee Heights, Courtney, Oak Grove Center and Risley and First and Alder Streets in the City of Portland, Oregon, to-wit: the sum of fifteen cents a single passage in either direction is unjust and unreasonable, and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in the City of Portland and said points would be the sum of ten cents.

It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist
60 from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates,

fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents, and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the city of Portland, Oregon, in either direction.

It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedule on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.

The privileges and order herein are predicated upon the defendant continuing to offer to the traveling public the 20 ride commutation rates scheduled on Page 4 of its Tariff O. R. C. No. 1,
61 and if the defendant should withdraw such commutation rates between the points covered by this order, the right is hereby reserved to the plaintiff to move for a rehearing hereof.

Dated at Salem, Oregon, this 30th day of January, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
OSWALD WEST,
CLYDE B. AITCHISON,
Commissioners.

Attest:

GEO. O. GOODALL,
Secretary.

[Seal of Commission.]

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,

vs.

THE PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Amended Order.

Now on this 11th day of April, 1908, this matter comes on again before the Railroad Commission of Oregon upon the order of the Honorable Circuit Court of the State of Oregon in and for Marion County, made and entered in the case entitled Portland Railway, Light and Power Company vs. Railroad Commission of Oregon, which said order remands the above entitled matter to the said Commission for further consideration, pursuant to the provisions of Section 34 of Chapter 53 of the Laws of Oregon for the year 1907.

The plaintiff appears by Giltner and Sewall, its attorneys, and the defendant appears by Fred'k V. Holman and Franklin T. Griffith, its attorneys.

And the Commission having heard and considered the original evidence taken before it, and the additional evidence remanded to it by the said Circuit Court, and also the arguments of counsel for the respective parties, amends its former findings and order in the following respects and none other, to-wit:

62 First, by adding to Paragraph 4 of the said findings and order the following, to-wit: "and unjustly discriminatory against the localities of Milwaukee Heights, Courtney, Oak Grove, Center and Risley."

Second, by adding to Paragraph 5 of the said findings and order the following, to-wit: "and unjustly discriminatory against the localities of Milwaukee Heights, Courtney, Oak Grove, Center and Risley."

In all other respects the order hereinbefore entered by the said Commission in the above entitled matter remains intact and unchanged.

The said original order is hereby referred to and made a part hereof.

It is further ordered that a certified copy of this order, together with the transcript of evidence and of the proceedings transmitted by the said Circuit Court to this Commission shall be returned by the Secretary of this Commission to the said Circuit Court forthwith, as the report of the said Commission of this action thereupon.

It is further ordered that a certified copy of this order be served upon the plaintiff and defendant herein.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL,
Secretary.

That the defendant have and recover of and from the plaintiff the costs and disbursements herein taxed at $10.00.

That the injunction heretofore issued in this cause be and the same is hereby dissolved.

Plaintiff at this time, by its attorney, Franklin T. Griffith, gives notice in open court that the plaintiff appeals from the above decree and from the whole thereof to the Supreme Court of the State of Oregon, which said appeal is hereby allowed.

63 Dated this 22d day of June, A. D. 1908.

WM. GALLOWAY,
Judge of the Third Judicial District.
of the State of Oregon.

And afterward, on the said 22d day of June, 1908, the following

Order of Court Staying Proceedings

was duly made and entered of record, viz:

(Title.)

This matter coming on to be heard this 22 day of June, 1908, plaintiff appearing by Frederick V. Holman and Franklin T. Griffith, its attorneys, and the defendant appearing by A. M. Crawford, Attorney General, Giltner & Sewall and C. B. Aitchison, its attorneys, and the court having heretofore, on this day rendered its certain decree in the above entitled suit dismissing the complaint of plaintiff and sustaining the amended order of the defendant complained of in said suit and plaintiff having, by its said attorneys, at the time said decree was made given notice in open court that plaintiff appeals from such decree and the whole thereof, to the Supreme Court of the State of Oregon, and which notice of appeal has been duly entered in the Journal of this court and plaintiff having applied for an order of this court directing that the operation of the amended order of said defendant complained of in the above entitled suit, be suspended and stayed until the final determination of said cause in the Supreme Court of the State of Oregon, and it appearing to the court that said application of plaintiff should be granted, now, therefore, it is Ordered,

That the operation of the order of the said defendant dated the 30th day of January, 1908, as amended by said defendant on the 11th day of April, 1908, wherein said defendant ordered and required the said plaintiff to desist in certain practices and to put into effect certain rates in said amended order specified, which are as follows:

64 "It is therefore Ordered, Considered and Determined, that the Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, the

rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further Ordered, Considered and Determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Street in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further Ordered, Considered and Determined that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service."

Be stayed and suspended until the final determination of this cause in the Supreme Court of the State of Oregon upon condition that the said plaintiff shall, within ten days from the date hereof,
65 make and execute a bond herein in the sum of Five Thousand ($5,000.00) Dollars as by law required, in favor of said Railroad Commission of Oregon for the benefit of whom it may concern in accordance with the statute in such cases made and provided, to be approved by this court. And it is further ordered,

That from and after the filing and approval of said bond as aforesaid, the operation of said order of said defendant as amended be, and the same is hereby, suspended and stayed until the final determination of said cause in the Supreme Court of the State of Oregon. And it is further Ordered,

That pending said appeal said plaintiff shall continue to issue to each person traveling as a passenger upon its said Oregon City Division between the stations of Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction and paying a cash fare therefor fifteen cents, a receipt or other evidence to the effect that five cents of said fifteen cents cash fare is paid by such person or passenger subject to repayment to such person or passenger by said plaintiff, should the decree of this court in said cause be affirmed upon said appeal.

Dated June 22, 1908.

WM. GALLOWAY, *Judge.*

66 And afterward, on the said 22d day of June, 1908, the said plaintiff duly filed with the clerk of the said court, its

Undertaking on Appeal

in words and figures as follows:

(Title.)

Whereas the plaintiff in the above entitled suit has appealed to the Supreme Court of the State of Oregon from a judgment order and decree made and entered against the plaintiff in said suit, in the said Circuit Court, in favor of the defendant in said suit, on the 22d day of June, 1908, for the sum of $10.00, costs and disbursements of suit, dismissing the complaint of plaintiff and sustaining that certain order of the defendant made and rendered on the 30th day of January, 1908, as amended by the defendant on the 11th day of April, 1908, wherein said defendant ordered and directed said plaintiff as follows:

"It is therefore Ordered, Considered and Determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further Ordered, Considered and Determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

67 "It is further Ordered, Considered and Determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

Now, Therefore, We, Portland Railway Light and Power Company, as principal, and American Surety Company of New York as surety, in consideration of the premises and of such appeal and of the suspending and staying of the operation of the said order of the said defendant dated January 30, 1908, as amended April 11, 1908, do hereby jointly and severally undertake and promise, on the part of the appellant, that if said decree appealed from, or any part thereof, be affirmed, the appellant shall pay and satisfy the amount directed to be paid thereby and all damages, costs and disbursements which may be awarded against the appellant on the appeal.

And said Portland Railway Light and Power Company as principal and American Surety Company of New York as surety, in consideration of the suspending and staying of the operation of said order of said defendant as amended, pending the said appeal, do
68 jointly and severally undertake and promise the Railroad Commission of Oregon, for the benefit of whom it may concern, to the effect that in case said decree shall be affirmed, the said appellant shall answer for all damages caused by the delay in the enforcement of the said order of the said defendant as amended, as aforesaid, and all penalties that would attach against the said Portland Railway Light and Power Company and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of said defendant as amended, as aforesaid, had not been stayed and suspended during the period transpiring from the time of taking said appeal until the final determination of said suit in the said Supreme Court, not exceeding the sum of Five Thousand ($5,000.00) Dollars, as it or they may sustain by reason of said appeal.

Dated this 22 day of June, 1908.

PORTLAND RAILWAY LIGHT AND POWER, COMPANY,
By FRANKLIN T. GRIFFITH, *Its Attorney.*
AMERICAN SURETY COMPANY OF NEW YORK,
By HOMER H. SMITH, *Resident Vice President.*

Attest:
CAREY F. MARTIN,
Resident Asst. Secretary. [SEAL.]

STATE OF OREGON,
County of Marion, ss:

Due service of the within undertaking is hereby accepted in Marion County, Oregon, this 22 day of June, 1908, by receiving a copy thereof, duly certified to as such by Franklin T. Griffith, of attorneys for plaintiff.

A. M. CRAWFORD,
Of Attorneys for Def't.

Endorsed: "Approved June 22, 1908. Wm. Galloway, Judge."

69 In the Circuit Court of the State of Oregon for the County of Marion.

STATE OF OREGON,
County of Marion, ss:

I. R. D. Allen, Clerk of the Circuit Court of the State of Oregon, for the County of Marion, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries, constituting the judgment roll, together with notice of appeal (embodied in the final order) and undertaking on appeal and proof of service thereof, in the case of

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff and Appellant,
vs.
RAILROAD COMMISSION OF OREGON, Defendant and Respondent,

have by me been compared with the originals thereof, and that they are true and correct copies of such original pleadings, papers, orders and journal entries and of said Notice of Appeal (embodied in said final order) and of said Undertaking on Appeal and proof of service thereof, and as the same appear of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court the 12th day of August, A. D. 1908.

R. D. ALLEN,
Clerk of the Circuit Court in and for the County of Marion, State of Oregon.

70 In the Circuit Court of the State of Oregon for the County of Marion.

No. 8963, Oak Grove Case.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,
vs.
RAILROAD COMMISSION OF OREGON, Defendant.

This matter coming on to be heard, plaintiff appearing by Franklin T. Griffith, Esq., of counsel, and it appearing to the Court that heretofore on the 22d day of June, 1908, upon motion of plaintiff, an order was duly made in this court allowing plaintiff until the 22d day of August, 1908, in which to file its transcript on appeal herein in the Supreme Court of the State of Oregon, and it further appearing to the court that the clerk of this court has failed to enter the said order upon the Journal of this court, now upon motion of plaintiff,

It is ordered that plaintiff be allowed until the 22d day of August,

1908, in which to file its transcript on appeal in this cause in the Supreme Court of the State of Oregon, And it is further

Ordered that this order be entered nunc pro tunc as of the 22d day of June, 1908.

Dated August 17, 1908.

WM. GALLOWAY, *Judge.*

71 STATE OF OREGON,
County of Marion, ss:

I, R. D. Allen, County Clerk for Marion County, State of Oregon, and ex-officio Clerk of the Circuit Court for said County and State, do hereby certify that the foregoing Exhibits and testimony constitute all the evidence heard or offered to be heard at the trial of a cause in the Circuit Court of the State of Oregon for Marion County, wherein the Portland Railway Light and Power Company was plaintiff and the Railroad Commission of Oregon was defendant.

Witness my hand and the seal of said Court this 12th day of August, A. D., 1908.

R. D. ALLEN, *Clerk.*

72 Endorsed: "Oak Grove Case." No. 8963. In the Circuit Court of the State of Oregon for the County of Marion. Department No. 2. Portland Railway Light & Power Company, Plaintiff, vs. Railroad Commission of Oregon, Defendant Transcript on appeal. Filed Aug. 22, 1908. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy.

73 P. R. L. & P. Co. EXHIBIT 1.

In the Circuit Court of the State of Oregon for the County of Marion.

6967
Case No. 6968, Drawer No. 652.

Filed Aug. 22, 1908. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,

v.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Transcript of Proceedings.

Filed March 12th, 1908. R. D. Allen, Clerk, by Bertha L. Allen, Deputy.

P. R. Lt. & P. Co. Ex. 1.

74 Before the Railroad Commission of Oregon.

Present: Thos. K. Campbell, Chairman, Oswald West, and Clyde B. Aitchison, Commissioners; Geo. O. Goodall, Secretary.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Be it remembered: That the following proceedings were had before the Railroad Commission of Oregon in the above entitled matter, to-wit:

On, to-wit, the 15th day of August, 1907, the plaintiff, the Oak Grove Improvement Association, files its complaint herein in words and figures following, to-wit:

74½ Before the Railroad Commission of Oregon.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

(Copy.)

Now comes the above named plaintiff by B. Lee Paget, its president, as relator, and respectfully shows:

1.

That the plaintiff is a voluntary association of persons residing in and about stations on the line of the defendant known as Milwaukee Heights, Courtney, Oak Grove, Center and Risley, the same being on the Oregon City Division thereof, and the object of said association is the general improvement, advancement and welfare of the community and of property interests in and about the said localities. That its secretary is S. L. Castro, whose address is Oak Grove, Oregon.

2.

That the defendant is a corporation organized and existing under the laws of Oregon, and its articles of incorporation heretofore duly executed and filed as by law required do set forth and provide therein as follows:

In addition to the enterprise business * * * the new enterprise or pursuit in which this corporation purposes to engage is the construction, purchase, acquiring, ownership, improvement, leasing from or to other corporations or individuals, maintenance, use and

operation of lines of street railway and other lines, with rolling stock and equipment, car barns, shops, power plants, depots, stations, poles, wires, conduits, subways, apparatus and appliances, telephone lines, telegraph lines and other buildings and property for the operation thereof in, on, over, under, along and through the streets, roads, alleys and other public places and private places and private property in the cities of Portland, Oregon City and Salem, in the counties of Multnomah, Clackamas and Marion, in the state of Oregon,
75 and in and through other counties, cities, towns and villages of said state of Oregon and in the city of Vancouver and in the county of Clarke in the State of Washington and in and through other cities, towns and villages in the said State of Washington * * *

In the prosecution of and in connection with and in addition to the aforesaid general enterprise or pursuit, this corporation purposes to engage in the following enterprise, or pursuit:

To construct, purchase, acquire, own, improve, lease from and to other corporations and individuals, maintain, use and operate lines of railway in and through the cities of Portland, Oregon City and Salem and the counties of Multnomah, Clackamas and Marion and other counties in the state of Oregon and also in the city of Vancouver and the county of Clarke and other counties in the state of Washington and for this purpose to exercise the right of eminent domain and appropriate private property.

To receive, carry and transport passengers, freight, baggage, express matter and United States Mails.

To charge and collect rates, fares, freights, tolls, lockage, and other compensation for any service, right, privilege, benefit, use, accommodation, passage, transportation, commodity or other matter or thing rendered or furnished by it.

This corporation proposes to acquire, make, construct and operate lines of railway with termini as follows:

(*a*) From the city of Portland in the county of Multnomah, state of Oregon, in a general southeasterly direction to sec. 3 T. 4 S. R. 4 E. of W. M. in the county of Clackamas in said state.

(*b*) From the said city of Portland in a general southerly direction to and through Oregon City to the town of Canemah on the Willamette River about 1 mile south of Oregon City in said County of Claskamas.

(*c*) From the said city of Portland in a general easterly and southeasterly direction to and through the village of Lents, to Lents Junction on the line of Railway first above mentioned, in said
76 county of Multnomah.

(*d*) From a point on the line of railway first above mentioned near the town of Cedarville in sec. 17 T. 1 S. R. 3 E. of W. M. in a general northerly and northeasterly direction to and through the village of Troutdale in said county of Multnomah to the Columbia River opposite Lady's Island.

(*e*) From said city of Portland in a general northerly direction to Shaw's or Hayden's Island in the Columbia River in said county of Multnomah.

(*f*) From said City of Portland, in a general westerly or north-

westerly direction to the city of St. Johns in said county of Multnomah.

(*g*) From the town of Oswego in said county of Clackamas in a general southerly direction to the town of Willamette in said county, thence in a general northwesterly direction to the town of Tualitin in the county of Washington in said state.

(*h*) From the city of Salem in the County of Marion in said state in a general southerly direction, a distance of about three miles to a quarry known as the Ewald property.

3.

That the defendant has been for a long time past and is now engaged in the enterprise and business set forth in its said articles and particularly in the transportation of passengers as a common carrier over the lines of its railway system, all radiating from divers and sundry places within the city of Portland, outward therefrom.

4.

That the defendant as such common carrier has for a long time past and does now own and operate or operate, manage and control an interurban railroad between various cities, towns, villages, stations and places and for example more particularly the following, viz:

Between

(*a*) The termini of its lines of railway on Portland Heights, Willamette Heights, Thurman Street, Terminal Yards, Mt.
77 Tabor, Albina Avenue, Montaville, Irvington, Russell Street, Fulton, Hamilton Avenue, Jefferson Street, Lincoln Street, Montgomery Street, Northrup Street, as also other streets and places, all within the said city of Portland,

And

(*b*) St. Johns, Oregon City, Estacada, Milwaukee, Gresham, each municipalities organized and existing under the constitution and laws of Oregon, as well as other places and stations beyond the limits of the city of Portland, being for example Lents, Lents Junction, Courtney, Oak Grove, Center, Risley, Milwaukee Heights, Golf Links, Sellwood, Gates and many others.

5.

That the defendant demands and collects rates, fares and charges for the transportation of members of the plaintiff association and all other persons travelling as passengers upon its said lines between the places named in subdivision (*a*) paragraph 4 herein and the places named below; amounts for the services so rendered by it to such persons, as set opposite each place, the distance travelled being likewise set opposite, to-wit:

Golf Junction	upward of	5.36	miles	5	cents.
Lambert	" "	5.93	"	15	cents.
Knight	" "	6.29	"	15	"
Hendee	" "	6.44	"	15	"
Milwaukee	" "	6.71	"	15	"
Milwaukee Heights	" "	7.70	"	20	"
Courtney	" "	8.30	"	20	"
Oak Grove	" "	8.48	"	20	"
Center	" "	8.68	"	20	"
Reservoir	" "	4.69	"	5	"
Lents	" "	7.69	"	5	"
Lents Junction	" "	10.71	"	15	"
Gilbert	" "	11.65	"	15	"
Gates	" "	12.38	"	15	"
78 Wilson	upwards of	13.00	miles	20	cents.
Sycamore	" "	13.48	"	20	"
Jenne	" "	14.43	"	20	"
St. Johns	" "	9.37	"	5	"

and also between its station of Golf Junction and places named below, fares for distances as set opposite thereto, viz:

Nickum	1.15	miles	5	cents.
Kerrigan	1.90	"	5	"
Bell	3.15	"	5	"
Kendall	3.96	"	5	"
Lents Junction	5.35	"	5	"
Jenne	9.07	"	10	"
Hendee	1.08	"	5	"
Milwaukee	1.35	"	5	"
Island	1.69	"	5	"
Milwaukee Heights	2.35	"	10	"
Courtney	2.94	"	10	"
Oak Grove	3.12	"	10	"
Center	3.32	"	10	"

6.

That the rates, fares and charges for the services rendered by defendant in transporting passengers between the places set forth in sub-division (*a*) of paragraph 4 herein and the stations of Milwaukee Heights, Courtney, Oak Grove, and Center should be no greater than 5 cents for one trip over defendant's said railway lines and the aforesaid rates and fares heretofore and now demanded and collected of each and all passengers by the defendant for transportation between the places last named are much higher than for identical services rendered by the defendant to other persons travelling over its said lines between other interurban places, for the same or for greater distances, as clearly appears by an inspection of defendant's official schedules of such rates and charges herein set out, and all of said acts, demands,
charges by and on the part of the defendant tend to prevent
79 the settlement, building up and increase in valuations of property in the community where members of the plaintiff reside,

to their great disadvantage, damage and injury, and against their general welfare; whereas the acts, charges and things as herein related with respect to other localities and persons receiving like service at less rates and fares tend to a directly opposite result as with the plaintiff and its localities. That the said rates and fares so charged and collected of members of the plaintiff and all persons travelling between Milwaukee Heights, Courtney, Oak Grove, Center, and the other points hereinbefore set out are, *but* reason of the foregoing premises unjust, unreasonable and contrary to the statutes made and provided.

7.

Wherefore, plaintiff prays that the defendant be required to answer the charges herein and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of chapter 53, Laws of Oregon for the year 1907; and that the commission shall fix and order substituted such rate or rates, fares or charges as it shall determine to be just and reasonable, and which shall be charged and collected and complied with in the future, in the place of those found to be unreasonable or unjustly discriminatory; and for such other and further relief or orders as may be meet and necessary in the said matter.

Dated at Portland, Oregon, this 14th day of August, 1907.

(Signed) THE OAK GROVE IMPROVEMENT ASSOCIATION, *Plaintiff*,
(Signed) By B. LEE PAGET, *President*.

(Signed) R. C. WRIGHT,
Attorney for Plaintiff.

Endorsed on the back as follows: Railroad Commission of Oregon. Filed Aug. 15, 1907. E. G. Miller, Acting Secretary.

80 On August 15th, 1907, the Railroad Commission of Oregon caused to be issued a notice that complaint has been made to the defendant, Portland Railway Light and Power Company, which complaint is in the words and figures following, and service of which is duly accepted by said defendant on August 16th, 1907, as appears by acceptance of service upon said notice.

81 (Copy.)

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, Defendant.

Notice to Defendant That Complaint Has Been Made.

To the above named Defendant:

Please take notice that the above named plaintiff has made complaint to the Railroad Commission of Oregon, a certified copy of which complaint is herewith served upon you, and is made a part hereof. If you desire to make any answer to said complaint, the same should be filed within ten days from the date of service hereof.

After the expiration of ten days from the date of service hereof, said Commission will proceed to investigate the matters and things set forth in the said complaint.

Dated this 15th day of August, 1907.

RAILROAD COMMISSION OF OREGON,
(Signed) By THOS. K. CAMPBELL,
OSWALD WEST,
CLYDE B. AITCHISON,
Commissioners.

[Seal of Railroad Commission of Oregon.]

Attest:

E. G. MILLER,
Acting Secretary.

Due and legal service of the foregoing notice is hereby accepted, and a certified copy of said complaint received this 16th day of August, 1907.

(Signed) PORTLAND RAILWAY, L'T & POWER CO., *Defendant,*
By F. I. FULLER,
(Title) *Vice Pres.*

82 And afterwards, on, to-wit, the 22d day of August, 1907, the said notice that complaint has been made, together with the defendant's acceptance of service thereof, were returned to the said Commission and were fuly filed.

And on, to-wit, September 5th, 1907, the defendant filed its answer herein in words and figures following, to-wit:

83

(Copy.)

Before the Railroad Commission of Oregon.

File No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. Lee Paget, as Relator, Plaintiff,

vs.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

I.

Comes now the defendant and for answer to the complaint on file herein admits, denies and alleges as follows:

1.

Admits all of paragraph 1 of said complaint.

2.

Admits all of paragraph 2 of said complaint.

3.

Denies all of paragraph 3 of said complaint except that defendant admits that it has been and is now engaged in the enterprise and business of the transportation of passengers as a common carrier over lines of railway with termini as follows:

(*a*) From the city of Portland in the County of Multnomah, state of Oregon, in a general southeasterly direction to sec. 3 T. 4 S. R. 4 E. of W. M. in the county of Clackamas in said state—this line being known and hereinafter referred to as the "Springwater Division."

(*b*) From the said city of Portland in a general southerly direction to and through Oregon City to the town of Canemah on the Willamette River about 1 mile south of Oregon City in said county of Clackamas—this line being known and hereinafter referred to as the "Oregon City Division."

(*c*) From the said city of Portland in a general easterly and southeasterly direction to and through the village of Lents, to Lents Junction on the line of railway first above mentioned, in said county of Multnomah—this line being known and hereinafter referred to as the "Mt. Scott Division."

84 (*d*) From a point on the line of railway first above mentioned near the town of Cedarville in sec. 17 T. 1 S. R. 3 E. of W. M. in a general northerly and northeasterly direction to and through the village of Troutdale in said county of Multnomah to the Columbia River opposite Lady's Island—this line being known and hereinafter referred to as the "Troutdale Division."

4.

Denies all of paragraph 4 of said complaint, except that defendant admits that it has and does own and operate and manage and control interurban railroads between the termini of its lines of railway in the city of Portland and Oregon City, Milwaukee, Gresham, Lents, Lents Junction, Courtney, Oak Grove, Center, Risley, Milwaukee Heights, Golf Junction, Sellwood and Gates, and between various cities, towns, villages, stations and places on its said "Springwater division" and on its said "Oregon City division" and on its said "Mt. Scott division" and on its said "Troutdale division": and defendant denies in particular that any of the termini of its lines of railway in the city of Portland are at any of the places or points in said city set forth in subdivision (*a*) of said paragraph 4, or that it owns or operates or manages or controls any line of railroad to St. Johns or between St. Johns or any other place.

5.

Denies all of paragraph 5 of said complaint except that defendant admits that it demands and collects for the transportation of persons travelling as passengers upon its said lines of railway between its terminus at First and Alder Streets in said city of Portland and the places and points named below and between Golf Junction and the places and points named below, the following rates, fares and charges—the distances being as set forth below, to-wit:

Between Portland and

On Oregon City Division.

Golf Junction (within city of Portland)....	5.36 miles	5 cents.

Lambert	5.93 miles	10 cents.
Knight	6.29 "	10 "
Hendee	6.44 "	10 "
Milwaukee	6.71 "	10 "
Island	7.05 "	10 "
Milwaukee Heights	7.70 "	15 "
Courtney	8.30 "	15 "
Oak Grove	8.48 "	15 "
Center	8.68 "	15 "
Risley	9.26 "	15 "

On Mt. Scott Division.

Reservoir (within City of Portland).....	4.69 miles	5 cents.
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within city of Portland)....	5.35	miles	5 cents.
Nickum	6.51	"	5 "
Kerrigan	7.26	"	10 "
Bell	8.51	"	10 "
Kendall	9.32	"	10 "
Lents Junction	10.71	"	10 "
Gilbert	11.65	"	10 "
Gates	12.38	"	10 "
Wilson	13.00	"	15 "
Sycamore	13.48	"	15 "
Jenne	14.43	"	15 "

Between Golf Junction and

On Oregon City Division.

Lambert	.57	miles	5 cents.
Knight	.93	"	5 "
Hendee	1.08	"	5 "
Milwaukee	1.35	"	5 "
Island	1.69	"	5 "

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Milwaukee Heights	2.34	"	10 "
Courtney	2.94	"	10 "
Oak Grove	3.12	"	10 "
Center	3.32	"	10 "
Risley	3.90	"	10 "

On Springwater Division.

Nickum	1.15	miles	5 cents.
Kerrigan	1.90	"	5 "
Bell	3.15	"	5 "
Kendall	3.96	"	5 "
Lents Junction	5.35	"	5 "
Gilbert	6.29	"	10 "
Gates	7.02	"	10 "
Wilson	7.64	"	10 "
Sycamore	8.12	"	10 "
Jenne	9.07	"	10 "

6.

Denies all of paragraph 6 of said complaint.

7.

Denies each and every allegation of said complaint except as herein specifically admitted.

II.

And for a further and separate defense to plaintiff's complaint this defendant says that said complaint does not state facts sufficient to show that defendant has in any respect violated any of the provisions of chapter 53 of the session laws of 1907 of the Legislative Assembly of the state of Oregon and that this Railroad Commission has no power or authority or jurisdiction to proceed further against this defendant under plaintiff's complaint.

III.

And for a further and separate defense to plaintiff's complaint this defendant alleges:

87

1.

That defendant's "Oregon City division" extends from its terminus on First and Alder Streets in Portland to and through Golf Junction on the southern boundary line of Portland and thence in a general southerly direction to Oregon City and Canemah; and that defendant's "Springwater division" extends from said terminus in Portland to and through said Golf Junction and thence in a general easterly direction to and through Lents Junction and in a general southeasterly direction to Cazadero; and that defendant's "Mt. Scott division" extends from said terminus in Portland in a general easterly and southeasterly direction, not passing through or near said Golf Junction, to and through Lents and thence in the same direction to said Lents Junction.

2.

That defendant operates its cars of and from all its said divisions within the corporate limits of the city of Portland under franchises by the terms and provisions of which it is prohibited from charging any passenger more than five cents for any one continuous ride in any one general direction on any of said cars; and that as said city of Portland has a population exceeding 50,000 inhabitants, this defendant is also prohibited by section 2096 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon from charging any passenger more than five cents for a continuous ride in one general direction in said city.

3.

That defendant charges a fare of 25 cents for a ride from its said terminus in Portland to Oregon City, a distance of 14.47 miles; and that said fare is approximately at the rate of 2 cents per mile.

4.

That because of the facts set forth in paragraph 2 of this defense, defendant cannot, on or for any ride on its "Oregon City division" charge at the rate of 2 cents per mile or charge more than 5 cents in all for the 5.36 miles between its said terminus on First and

Alder Streets and Golf Junction, as all of said 5.36 miles *is*
88 within said city of Portland; and that, because it is not practical or convenient to collect fares on said division other than in multiples of five cents, defendant has, for the purpose of maintaining fair and just rates throughout said division, distributed the remaining 20 cents of the 25 cent fare from Portland to Oregon City by dividing the remaining 9.11 miles of the total mileage between said cities into four districts and applying to all points within each district a group rate of 5 cents more than the fare to points within the next district on the north. Thus: (*a*) The first district includes Lambert, Knight, Hendee, Milwaukee and Island and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 10 cents and from Golf Junction 5 cents less; (*b*) the second district includes Milwaukee Heights, Courtney, Oak Grove, Center and Risley and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction 5 cents less; (*c*) the third district includes all stations from and including Concord to and including Clackamas Bridge and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 20 cents and from Golf Junction 5 cents less; and (*d*) the fourth district includes Park Place and Oregon City and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 25 cents and from Golf Junction 5 cents less.

5.

That if, as asked by the plaintiff, the fares from Portland to Milwaukee Heights and to Courtney and to Oak Grove and to Center and to Risley—being the places within the second district referred to in the preceding paragraph—should be reduced to 5 cents, then, and with far more reason than plaintiff has for its complaint, complaints of unjust and unreasonable fares to and unjust discrimination against stations and places on said "Oregon City division" south of Risley would be made to this Commission,
89 and, to be consistent, this commission would have to reduce the fares from Portland to the districts referred to in the preceding paragraph, as follows: to all places within the third district to 10 cents and to all places within the fourth district to 15 cents; and that such reductions would mean a 15 cent fare or a rate of one cent per mile from Portland to Oregon City; and that, furthermore, if plaintiff is entitled to have the fares reduced from Portland to places within the said second district because the fares to other points and places on other lines and divisions of defendant's railway system are less per mile, then, after plaintiff has accomplished its purpose, complaints will pour in to this commission from all places on any of defendant's lines and divisions to which the fare charged for and rate from Portland is less per mile than the reduced fares granted on plaintiff's complaint to said places within the said second district of the "Oregon City division," and eventually the fares on all of the defendant's lines and divisions

would have to be reduced to the rate of one cent per mile, which would be absolutely disastrous to the defendant's business and effectively stop any extension of its lines or expansion of its system of interurban electric railway.

6.

That though the fare charged by defendant for one ride from Portland to the places included in said second district on said "Oregon City division" is 15 cents, defendant has established commutation rates to said places and sells commutation books to each of said places, containing 20 coupons, each of which entitles the bearer to a ride to or from Portland, at the following rates: $1.50 for Milwaukee Heights, $1.60 for Oak Grove, $1.70 for Center, and $2.00 for Risley.

7.

That Golf Junction on the southern boundary of Portland is the junction of defendant's "Oregon City division" and "Springwater division," and from that point to its terminus on First and Alder Streets in Portland, defendant's cars of and from both divisions are run over the same tracks; and that defendant's "Oregon
90 City division" extends south from Golf Junction, and on trips to or in the direction of Oregon City its cars thereon are out of Portland after leaving Golf Junction; and that defendant's "Springwater division" proceeds in an easterly direction from Golf Junction, and on a trip to or in the direction of Cazadero its cars on said division remain within the corporate limits of Portland for nearly a mile after leaving Golf Junction; and that the station of Nickum referred to in plaintiff's complaint is the first station on said "Springwater division" east of Golf Junction and is only about one half mile east of the easterly boundary of Portland; and that on said "Springwater division" defendant runs regular trains which stop for the taking on and letting off of passengers only at stations, and that as there is no station on said division between Golf Junction and Nickum and the former is within Portland and the latter but a short distance out of Portland and passengers are entitled to and can insist upon being carried to the boundary of Portland for 5 cents and it would be decidedly inconvenient and unnecessarily expensive and to the detriment of the service for defendant to stop all its trains at said boundary, defendant has extended the 5 cent fare limit on said division to Nickum as the first station outside of Portland.

8.

That the circumstances and conditions at and about and the service to Nickum are not like or similar to or contemporaneous with the circumstances and conditions at and about the service to the places included in said second district of said "Oregon City division;" and that the fare charged by defendant from Portland to Nickum on said "Springwater division" does not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by defendant from Portland to the places within said

second district for the purpose of determining whether or not the latter are just or reasonable or justly or unjustly discriminatory.

9.

That defendant's "Mt. Scott division" consists of a line of
91 railway running from its said terminus on First and Alder Streets in Portland to Mt. Tabor Junction at about the intersection of Hawthorne Avenue and East Forty-eight Street in Portland, and then in a general southeasterly direction to Lents in Multnomah County, and then a distance of .62 of a mile to a junction with said "Springwater division" at a point known as Lents Junction; and that though it is 10.71 miles from Portland to Lents Junction by the "Springwater division," it is only 8.31 miles from Portland to Lents Junction by the "Mt. Scott division;" and that said "Mt. Scott division" to a point about one mile southeasterly from Mt. Tabor Junction and about three miles northwesterly from Lents is wholly within the corporate limits of Portland.

10.

That the right of way and track and road from Mt. Tabor Junction to Lents were first acquired and constructed and the railway between said points was first operated by the Portland, Chicago & Mt. Scott Railway Company, a corporation whose stock was principally owned by those who lived or owned property at and between said points; and that defendant's predecessor acquired said stock and said right of way and track and road and railway between Mt. Tabor Junction and Lents from said stockholders and owners under an arrangement and agreement by which, for a valuable consideration, it expressly agreed that no more than a five cent fare should be charged by defendant's said predecessor and its successors and assigns for any ride between Lents and Portland; and that defendant is bound by said arrangement and agreement, and by reason thereof cannot charge more than 5 cents for any ride on said "Mt. Scott division" between Lents and Portland.

11.

That said "Mt. Scott division" was extended from Lents to Lents Junction, a distance of .62 of a mile, for the benefit and accommodation of the public generally, and particularly that portion thereof residing or being on or near the "Mt. Scott division" who would desire to go to points on the "Springwater Division," and
92 that portion thereof residing or being on or near the "Springwater division" who would desire to go to points on the "Mt. Scott division" and that the 5 cent fare limit on or via the "Mt. Scott division" was and is stopped at Lents; and that defendant could not and cannot charge more than 5 cents for a ride over or via said "Mt. Scott division" from Lents to Lents Junction or to points within a reasonable distance beyond said Lents Junction on the "Springwater division."

12.

That because of the facts and conditions set forth in the three preceding paragraphs hereof and the situation and conditions of defendant's lines and traffic generally, defendant cannot charge for a ride from Portland to Lents Junction over the "Springwater division" more than 10 cents—that being the fare it must charge for a ride between said points on the "Mt. Scott division;" and that it necessarily follows that defendant cannot charge more than ten cents for a ride on the "Springwater division" from Portland to any point between Portland and Lents Junction, for which reasons the fare from Portland to all points between Nickum and Lents Junction is only ten cents.

13.

That there is considerable travel between points beyond Lents Junction on the "Springwater division" and Lents and points between Lents and Portland on the "Mt. Scott division," such travel transferring from one to the other division at Lents Junction; and that, if more than a five cent fare was charged between Lents and any and all points on the "Springwater division" beyond Lents Junction regardless of their distances beyond Lents Junction, it would result in a division of only .62 of a mile from Lents to Lents Junction for and on which a five cent fare was charged and in unreasonable and unlawful rates from some points beyond Lents Junction to Lents; and that it therefore became necessary to create a district extending from Lents on the "Mt. Scott division" to Gates on the "Springwater division," a distance of 2.29 miles and to establish and apply a group rate of 10 cents for the fare from Portland via Lents to each station in that district on the "Spring-
93 water division," to-wit: Lents Junction, Gilbert and Gates,—Gates being only 1.67 miles beyond Lents Junction; and that, as it became necessary to establish a 10 cents rate from Portland to Gilbert and to Gates via Lents and the "Mt. Scott division," defendant had to also fix its fare from Portland to Gilbert and to Gates over the "Springwater division" at 10 cents.

14.

That the total distance from Portland to Cazadero over the "Springwater division" is 37.51 miles and the fare charged by defendant for the ride from Portland to Cazadero is 80 cents or approximately 2 cents per mile; and that because of the facts set forth in the preceding five paragraphs of this answer defendant cannot and does not charge more than 10 cents for that portion of said ride from Portland to Cazadero which ends at Gates; and that the distance from Gates to Cazadero is 25.23 miles and the remaining 70 cents of the total fare from Portland to Cazadero should be equitably distributed over said 25.23 miles; and that, because it is not practical or convenient to collect fares on the "Springwater

division" other than in multiples of five cents, defendant has, for the purpose of maintaining fair and just rates throughout said division, distributed said remaining 70 cents of said 80 cent fare from Portland to Cazadero by dividing said remaining 25.23 miles of the total mileage between said points—being the distance from Gates to Cazadero—into fourteen districts and applied to all points with- each district a group of rates of 5 cents more than the fare to points within the next district nearer Portland; and that, as a matter of fact, these group rate districts on the "Springwater division" are approximately only 1.81 miles in length, while the group rate districts on the "Oregon City division" are approximately 2.27 miles in length—showing that, as a whole, lesser fares are charged to intermediate points on the "Oregon City division" than on the "Springwater division"—the difference in this regard being due to the differences in the situation and circumstances and conditions of the two divisions as hereinbefore shown and explained; and
94 that the first of said districts on said "Springwater division" beyond Gates includes the stations of Wilson, Sycamore and Jenne and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction 5 cents less; and that the second of said districts on said "Springwater division" beyond Gates includes the stations of Meadowbrook and Cedarville and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 20 cents and from Golf Junction 5 cents less; and that in like manner the group rate applied to each of said districts and the fare for and rate to each station in said districts from Portland and from Golf Junction increases 5 cents as each district is reached on the way to Cazadero.

15.

That the situation of and the circumstances and conditions governing and controlling the traffic and service upon defendant's said "Springwater division" and said "Mt. Scott division" are not like or similar to or contemporaneous with the situation of and the circumstances and conditions governing and controlling the traffic and service upon defendant's "Oregon City division"; and that the fares charged by defendant on its said "Springwater division" and on its said "Mt. Scott division" do not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by defendant on its "Oregon City division" for the purpose of determining whether or not any of the latter are just or reasonable or justly or unjustly discriminatory.

16.

That the fares charged by defendant on all of its said divisions are fair and reasonable and just and in and by none of them is any provision of chapter 53 of the Session Laws of Oregon for 1907 violated.

Wherefore, defendant prays that this complaint be dismissed, and that the defendant go hence without any action or order being taken or made herein by this Honorable Commission.

PORTLAND RAILWAY LIGHT & POWER COMPANY,

95 By F. I. FULLER, *Vice Pres't.*
DAN J. MALARKEY AND
E. B. SEABROOK,
Attorneys for Defendant.

Endorsed on back as follows: Railroad Commission of Oregon. Filed Sept. 5, 1907. Geo. O. Goodall, Secretary.

96 Endorsements appearing on inside of cover of answer to complaint: to-wit:

STATE OF OREGON,
County of Multnomah, ss:

I, F. I. Fuller, being first duly sworn, depose and say that I am the Vice President and Manager of the defendant corporation in the above entitled case; and that the foregoing answer is true as I verily believe.

(Signed) F. I. FULLER.

Subscribed and sworn to before me this 4th day of September, 1907.

(Signed) DAN J. MALARKEY,
Notary Public for the State of Oregon.

STATE OF OREGON,
County of Multnomah, ss:

Due and legal service of the within paper in Multnomah County, Oregon, this 4th day of September, 1907, is hereby admitted.

(Signed) R. C. WRIGHT,
Attorney for Plaintiff.

97 And on, to-wit, September 9th, 1907, the following order was entered by the said commission in the above entitled matter, to-wit:

Ordered: That on the 24th day of September, 1907, at 10 o'clock in the forenoon of the said day, at the Newmarket Building in Portland, Oregon, the Railroad Commission of Oregon will proceed to investigate the above named cases, Nos. 89, 93 and 94 and will consider and determine such matters and make such order or orders as may be proper in the premises.

And on September 12th, 1907, the said commission caused ten days' notice of the time and place and when and where such matters would be considered and determined to be given to the defendant railroad and the plaintiff in words and figures following, due and legal service of which was accepted by both plaintiff and defendant as appears by the acceptance of service annexed to the said notice, to-wit:

98 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, Plaintiff,

v.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY, a Corporation, Defendant.

Notice of Hearing.

Notice of Time and Place of Hearing.

To the above named Plaintiff and Defendant:

Whereas, the above named plaintiff has heretofore filed with the Railroad Commission of Oregon a complaint, among other things alleging,

That the rates charged by the above named defendant for transportation over its lines to Milwaukee Heights, Courtney, Oak Grove and Center are unreasonable and discriminatory as compared to rates and fares charged for service to other localities and result to the great disadvantage, damage and injury of the residents of said named places.

And praying that said Railroad Commission of Oregon shall, after due hearing and investigation, make order commanding defendant to cease and desist from violations of chapter 53 Laws of Oregon for the year 1907 and that said commission shall fix and order substituted such rate or rates as it shall determine to be just and reasonable.

And whereas, the undersigned commission did on the sixteenth day of August, 1907, serve on the said defendant a copy of said complaint, together with a notice that the same had been filed, and that after the expiration of ten days from the date of service thereof said commission would proceed to investigate the matters and things set forth in said complaint;

And Whereas, more than ten days have elapsed since said complaint and the accompanying notice were served on said defendant, and said defendant has answered thereto;

Now, therefore, notice is hereby given that on the 24th day of September, 1907, at the hour of ten o'clock in the forenoon of the said day, or as soon thereafter as the parties can be heard, at the Newmarket Building, Portland, Oregon, the undersigned Railroad Commission of Oregon will proceed to investigate the said complaint and consider and determine such matters and make such order or orders as may be proper in the premises, at which time and place you will be entitled to be present, to be heard, and to have
99 process to enforce the attendance of witnesses.

Dated at Salem, Oregon, this 12th day of September, 1907.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
C. B. AITCHISON,
OSWALD WEST.

Attest:
GEO. O. GOODALL,
Secretary.

100 Due and legal service of the above and foregoing notice is hereby accepted and a copy thereof received this 13th day of September, 1907.

(Signed) PORTLAND RAILWAY LIGHT AND POWER COMPANY,
By F. I. FULLER, *Vice-Pres.*

Endorsed on the back as follows: Railroad Commission of Oregon. Filed Sep. 14, 1907. Geo. O. Goodall, Secretary.

101 And on September 19th, 1907, the following order was entered by the said commission in the above entitled matter, to-wit:

"Now on this 19th day of September, 1907, defendant in the above entitled case files a motion for continuance, and said motion is resisted by plaintiff; and same having been considered by the commission, it is Ordered, that the motion for continuance be and the same is hereby sustained, and the above entitled case be continued and be set for hearing on Monday, the 28th day of October, 1907, at ten o'clock in the forenoon of said day, at the Newmarket Building in Portland, Oregon."

And on, to-wit, October 28th, 1907, this matter comes on to be heard before the Railroad Commission of Oregon, pursuant to the order of said commission of September 19th, 1907. The plaintiff appears by B. Lee Paget, Esq., its Relator, and R. C. Wright, its Attorney. Defendant appears by F. I. Fuller, Esq., its Vice President, and D. J. Malarkey, Esq., and E. B. Seabrook, Esq., its Attorneys.

The evidence of the various witnesses was offered and received pro and con and adjournment taken at 5 P. M. until 9 A. M. October 29th, 1907.

Pursuant to adjournment commission met on October 28th, 1907, and continued the taking of testimony. Adjournment taken at 3:30 P. M. until 9 A. M. October 30th, 1907.

Pursuant to adjournment commission met on October 30th, 1907, and continued the taking of testimony at the hour and place above specified.

Hearing was then adjourned.

102 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, its Relator, Plaintiff,

v.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY, a Corporation, Defendant.

Ordered: That the above named case be set for argument on January 14th, 1908, at 1 o'clock p. m. at the office of the Railroad Commission of Oregon in the Capitol, at Salem, Oregon.

Dated at Salem, Oregon, January 3, 1908.

RAILROAD COMMISSION OF OREGON,
(Signed) By THOMAS K. CAMPBELL,
OSWALD WEST,
Commissioners.

Attest:
(Signed) GEO. O. GOODALL,
Secretary.

[Seal of Railroad Commission of Oregon.]

I dissent from so much of the foregoing order as fixes Salem as the place of hearing.
(Signed) CLYDE B. AITCHISON,
Commissioner.

103 And on, to-wit, January 13th, 1908, the said commission entered the following order, to-wit:

Ordered: That the date for hearing arguments in the above entitled cases, heretofore set for January 14, 1908, at Salem, Oregon, be changed to January 17, 1908 at 2 p. m. at Room 14 Newmarket Building, Portland, Oregon.

And on the said 13th day of January, 1908, the counsel for plaintiff and defendant were duly notified orally of the time and place when and where said argument would be had.

And on, to-wit, January 17, 1908, the above entitled matter was fully argued by counsel and submitted.

And on January 30, 1908, the said commission duly made and entered the following findings and order, to-wit:

104 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,

v.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY, a Corporation, Defendant.

Copy.

Order.

Now on this 30th day of January, 1908, this matter comes on before the above named commission for final determination and order, having heretofore been fully submitted; and the commission having heard and examined the complaint of the plaintiff, the answer of the defendant, the evidence and proofs offered, the arguments of the counsel, and being fully advised in the premises, finds:

(1) That the defendant Portland Railway Light and Power Company is a corporation organized under and existing by virtue of the laws of the state of Oregon and owns and operates by electric power a railroad or interurban railroad as a common carrier in this state, between First and Alder Streets in the city of Portland, and Canemah, Clackamas County, Oregon, (known as the Oregon City division) and also a line of railroad from said First and Alder Streets to Lents Junction, Multnomah County, Oregon, (known as the Mount Scott division) and also a line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Cazadero in Clackamas County, Oregon, (being known as the Springwater division) the station of Nickum being situated on said last mentioned line of railroad outside the corporate limits of the city of Portland, Oregon.

(2) That the plaintiff is a voluntary association of persons residing in and about stations on the lines of the defendant known as Milk kee Heights, Courtney, Oak Grove, Center and Risley, the same being on the Oregon City Division thereof; and that B. Lee Paget is the President of the said association and prosecutes this proceeding on its behalf.

105 (3) That the said defendant makes the following charges and collects the following fares, to-wit:

Between Portland and

On Oregon City Division.

Golf Junction (within city of Portland)	5.36	miles	5	cents.
Lambert	5.93	"	10	"
Knight	6.29	"	10	"
Hendee	6.44	"	10	"
Milwaukee	6.71	"	10	"
Island	7.05	"	10	"
Milwaukee Heights	7.70	"	15	"
Courtney	8.30	"	15	"
Oak Grove	8.48	"	15	"
Center	8.68	"	15	"
Risley	9.26	"	15	"

On Mt. Scott Division.

Reservoir (within city of Portland)	4.69	"	5	"
Lents	7.69	"	5	"
Lents Junction	8.31	"	10	"

On Springwater Division.

Golf Junction (within city of Portland)	5.35	miles	5	"
Nickum	6.51	"	5	"
Kerrigan	7.26	"	10	"
Bell	8.51	"	10	"
Kendall	9.32	"	10	"
Lents Junction	10.71	"	10	"
Gilbert	11.65	"	10	"
Gates	12.38	"	10	"
Wilson	13.00	"	15	"
Sycamore	13.48	"	15	"
Jenne	14.43	"	15	"

Between Golf Junction and

On Oregon City Division.

Lambert	.57	miles	5	"
Knight	.93	"	5	"
Hendee	1.08	"	5	"
Milwaukee	1.35	"	5	"
Island	1.69	"	5	"
Milwaukee Heights	2.34	"	10	"
Courtney	2.94	"	10	"
Oak Grove	3.12	"	10	"
Center	3.32	"	10	"
Risley	3.90	"	10	"

On Springwater Division.

Nickum	1.15	miles	5	"
Kerrigan	1.90	"	5	"
Bell	3.15	"	5	"
Kendall	3.96	"	5	"
Lents Junction	5.35	"	5	"
Gilbert	6.29	"	10	"
Gates	7.02	"	10	"
106 Wilson	7.64	miles	10	cents.
Sycamore	8.12	"	10	"
Jenne	9.07	"	10	"

(4) That the said rates, fares and charges demanded and collected by the defendant of and from persons traveling in either direction between Lents and Lents Junction and First and Alder Streets in the city of Portland, On the Mount Scott Division, and between Nickum, Kerrigan, Bell, Kendall, Lents Junction, Gilbert and Gates and said First and Alder Streets on the Springwater di-

vision of the defendant's railroad are unjustly discriminatory against the plaintiff association and the members thereof, and the Relator, B. Lee Paget, who travel between Milwaukee Heights, Courtney, Oak Grove, Center, and Risley, and said First and Alder Streets.

(5) The Commission further finds that from points on the Mount Scott division without the city of Portland the defendant furnishes to passengers who pay fare to First and Alder Streets in the city of Portland certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the plaintiff association and the members thereof, and the Relator B. Lee Paget, when traveling and paying fare from Milwaukee Heights, Courtney, Oak Grove, Center and Risley over the defendant's line of railroad to First and Alder Streets in the city of Portland, Oregon. The commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory against the plaintiff association and the members thereof, and the Relator, B. Lee Paget.

(6) The commission further finds that the existing fares and charges of the defendant between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the city of Portland, Oregon, to-wit, the sum of fifteen cents for a single passage in either direction is unjust and unreasonable, and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in
107 the city of Portland and said points would be the sum of ten cents.

It is therefore Ordered, Considered and Determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the city of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

It is further Ordered, Considered and Determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the city of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the city of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the city of Portland, Oregon, in either direction.

It is further Ordered, Considered and Determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in

lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.

The privileges and order herein are predicated upon the
108 defendant continuing to offer to the traveling public the 20 ride commutation rates schedules on page 4 of its Tariffs O. R. C. No. 1, and if the defendant should withdraw such commutation rates between the points covered by this order, the right is hereby reserved to the plaintff to move for a re-hearing hereof.

Dated at Salem, Oregon, this 30th day of January, 1908.

RAILROAD COMMISSION OF OREGON,
(Signed) By THOS. K. CAMPBELL,
" OSWALD WEST,
" CLYDE B. AITCHISON, *Commissioners.*

Attest:
(Signed) GEO. O. GOODALL, *Secretary.*

109 And on February 1, 1908, the defendant, Portland Railway, Light and Power Company duly accepted service of a duly certified copy of the said order by filing with the commission its acceptance of service in words and figures following, to-wit:

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Due and legal service of the order in the above entitled case is hereby accepted and a copy thereof received this 1st day of February, 1908.

(Signed) DAN J. MALARKEY,
Attorney for P. R. L. & P. Co.

Endorsed as follows: Railroad Commission of Oregon. Filed Feb. 7 1908. Geo. O. Goodall, Secretary.

110 And on February 1, 1908, the plaintiff, The Oak Grove Improvement Association, duly accepted service of a duly certified copy of the said order by filing with the commission its acceptance of service in words and figures following, to-wit:

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Due and legal service of the order in the above entitled case is hereby accepted and a copy thereof received this 1st day of February, 1908.

(Signed) R. C. WRIGHT,
Attorney for Plaintiff.

Endorsed as follows: Railroad Commission of Oregon. Filed Feb. 3 1908. Geo. O. Goodall, Secretary.

111 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
vs.
THE PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Amended Order.

And now on this 11th day of April, 1908, this matter comes on again before the Railroad Commission of Oregon upon the order of the Honorable Circuit Court of the State of Oregon in and for Marion County, made and entered in the case entitled Portland Railway Light and Power Company vs. Railroad Commission of Oregon, which said order remands the above entitled matter to the said Commission for further consideration, pursuant to the provisions of Section 34 of Chapter 53 of the laws of Oregon for the year 1907.

The plaintiff appears by Giltner & Sewall, its attorneys and the defendant appears by Fred'k V. Holman and Franklin T. Griffith its attorneys.

And the Commission having heard and considered the original evidence taken before it, and the additional evidence remanded to it by the said Circuit Court, and also the arguments of counsel for the respective parties, amends its former findings and order in the following respects and none other, to-wit:

First, by adding to Paragraph 4 of the said findings and order the following, to-wit: "and unjustly discriminatory against the

localities of Milwaukee Heights, Courtney, Oak Grove, Center and Risley."

Second, by adding to Paragraph 5 of the said findings and order the following, to-wit: "and unjustly discriminatory against the localities of Milwaukee Heights, Courtney, Oak Grove, Center and Risley."

112 In all other respects the order hereinbefore entered by the said Commission in the above entitled matter remains intact and unchanged.

The said original order, is hereby referred to and made a part hereof.

It is further ordered that a certified copy of this order, together with the transcript of evidence and of the proceedings transmitted by the said Circuit Court to this Commission shall be returned by the Secretary of this Commission to the said Circuit Court forthwith, as the report of the said Commission of its action thereupon.

It is further ordered that a certified copy of this order be served upon the plaintiff and defendant herein.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL,
Secretary.

113 STATE OF OREGON,
County of Marion, ss:

We, Thos. K. Campbell, Oswald West and Clyde B. Aitchison the members and commissioners of the Railroad Commission of Oregon do hereby certify that the foregoing is a true and correct transcript of all proceedings had in the above entitled matter.

And we hereby certify that the transcript of testimony certified to by F. Roy Davis, Official Stenographer of the said Railroad Commission of Oregon, is a full, true and correct transcript of the testimony taken upon the investigation made in the above entitled matter, which said transcript is hereby made a part hereof

Dated at Salem, Oregon, this 11th day of March, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:

[SEAL.] E. G. MILLER,
Acting Secretary.

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No. 94.

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THE OAK GROVE IMPROVEMENT ASSOCIATION, Plaintiff,
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PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Transcript of Evidence.

At the hearing of the above entitled matter before the Railroad Commission of Oregon, begun at the hour of 11:00 o'clock in the forenoon on the 28th day of October, 1907, in Room 14 at Number 7 First Street in the city of Portland, Oregon, the following evidence was offered and received, and the following proceedings were had, to-wit:

Present: The Chairman, Thos. K. Campbell, and commissioners Oswald West and Clyde B. Aitchison, and the stenographer, F. Roy Davis.

The said Portland Railway Light and Power Company appears by Mr. F. I. Fuller, Vice President and its Attorneys Dan J. Malarkey and E. B. Seabrook.

The said The Oak Grove Improvement Association appears by B. Lee Paget as its Relator, and its attorney R. C. Wright.

Mr. WRIGHT: Shall we introduce any tariffs in evidence or——

Mr. AITCHISON: We use all tariffs filed with the commission for reference and you can simply refer to any particular tariff you desire and it will be considered in evidence.

Mr. WRIGHT: I suppose the commission is familiar with the issues involved in this Oak Grove case, and while I would like to make a statement, I will omit doing so on account of these witnesses, and if it is agreeable to the commission I will call them right away?

Mr. AITCHISON: Call your first witness.

117 Mrs. M. EATON, a witness produced on behalf of the plaintiff, being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT.

Q. Where do you live, Mrs. Eaton?

A. At Lents, Oregon.

Q. How long have you lived there?

A. Eight years the first of January.

Q. Now it might be profitable to show to the commission and the counsel on the other side that they have taken issue with us on statements we make that our place has been deprived of opportunities for development against other place and of course it will be understood we may have time to argue upon the admis-ability of this fact later on, if that is agreeable, but I would like to get it in now and——

Mr. MALARKEY: What is this testimony. It can be understood that we object to all of that. The commissioners—You want to prove that Lents is a better town than Oak Grove on account of five-cent fare?

Mr. WRIGHT: Yes sir.

Mr. MALARKEY: Very well, but later on——

Mr. WRIGHT: Were you Secretary of the School District out there at any time?

A. For two years.

Q. What time was that?

A. I was elected in June, 1905, and again in June, 1906.

Q. Have you the records of the School District with you?

A. I have some of the records.

Q. Now, in order to save the calling of other witnesses, Mrs. Eaton, who is thoroughly familiar with the statistics—school statistics—can testify to them unless you insist upon the direct transcripts of those records. If you do, of course we will have to get them.

Mr. MALARKEY: What do you prpoose to show by Mrs. Eaton—as to the number of school children?

Mr. WRIGHT: Yes sir.

Mr. MALARKEY: Well, we do not see the materiality of it. We do not see the——

118 Mr. AITCHISON: Why not let the testimony go in upon the part of the defendant, as to the competency of it, the defendant reserving the right to object to the relevancy of the evidence.

Mr. MALARKEY: Some of it will be objected to by the defendant on account of hearsay evidence.

Mr. AITCHISON: Then you do not object to the school reports?

Mr. MALARKEY: We do not object to the material evidence.

Mr. WRIGHT: In 1901 state how many teachers you had at Lents, what your enrollment of pupils was and what the census?

A. In 1901 we had two teachers; the census was 107; enrollment 90 and only two rooms.

Q. What district was that known as for some time?

A. That had been the condition for some time. It was called District No. 12.

Q. And what territory did that district embrace?

A. All of what was consolidated with No. 1 last June as No. 12 and almost all of what is now Arleta.

Q. What did No. 12 consist of originally then.

A. That was what it was.

Q. You say all of No. 1 last year?

A. All annexed to No. 1 as No. 12. The district was about three miles long and I think about two miles wide as annexed last June.

Q. Did it include the town of Lents and vicinity?

A. Yes sir.

Q. And did it include Arleta?

A. Nearly all of it.

Q. And now in 1902 state?

A. In 1902 we had two teachers; census 124; enrollment was not given for that year and we still used only two rooms. That year our school house burned.

Q. Were you elected for that year?

A. No sir.

Q. You lived there?

A. Yes sir.

Q. What do you think the enrollment was on a census of 124?

A. It was probably about 100.

119 Q. What size building did you have there in 1901 and 1902 up to the time it burned?

A. Just two rooms.

Q. State in 1903 what the district furnished in the way of school facilities, and the enrollment and census?

A. They built a four-room school house and employed three teachers; census that year was 254—in 1903.

Q. In 1903?

A. In 1904—I have not 1903. There was no report for that year.

Q. I am asking about 1903 now.

A. It was between 1902 and 1903 we built the school house.

Q. Now, in 1904 what was the size of your building, number of teachers, enrollment and census?

A. We had the four rooms in 1904 and we had three teachers. That was what I just gave you.

Q. Those last statistics?

A. Yes sir.

Q. Now take 1905?

A. We had five teachers, census 415 and only four rooms.

Q. What was the enrollment?

A. I do not know the enrollment.

Q. Well, did you have occasion to get extra room in that year?

A. They rented an outside building.

Q. For school purposes?

A. Yes sir.

Q. In 1906 state how many teachers you had?

A. Eight.

Q. And your enrollment?

A. The enrollment I haven't—census was 505.

Q. Was the building increased that year?

A. We built six more rooms, making ten rooms.

Q. Is that the present size of the building?

A. Yes sir.

Q. In 1907 state?

A. Eleven teachers.

120 Q. And what was the enrollment and census?

A. Census 633.

Q. Have you all the room you need in the school there now?

A. We are very crowded—getting along but that is all.

Q. How many should they have in the rooms you have in use there at present?

A. Some of the rooms have 50 pupils in now.

Q. How many should they have to make conditions sanitary?

A. Not over 40.

Mr. WRIGHT: Take the witness.

Cross-examined by DAN J. MALARKEY:

Mr. MALARKEY: No cross examination.

Mr. AITCHISON: The people in this district you have spoken of all use the station at what point—Lents?

A. No, would have to use stations at the different points on the line.

Q. On the Lents line?

A. On Mount Scott line.

Mr. WRIGHT: Those people that she has just referred to—are they within the five cent fare limit?

A. According to contract with the company; yes sir.

Mr. MALARKEY: According to the contract of the company when they took the rolling stock?

A. In 1902.

Q. And you think the company took the rolling stock about 1902.

A. Yes sir. The cars were taken off in 1902, about the first of the year.

Q. How long have you lived out there, Mrs. Eaton?

A. Eight years next January.

Q. You were living out there before the cars were taken off at that time?

A. Yes sir.

Q. The cars were off for a while and before the company would put them back on the people out there owning property along the line between Portland and Lents made some concessions between them?

A. Yes sir.

Q. Didn't they, as a matter of fact, give them the line
121 by——

A. (Interrupting.) Yes sir, and gave them money besides, and the company agreed to maintain a five cent fare to any part of Portland.

Q. They were wise people out there.

A. Yes sir.

Q. Now, this school district that you have referred to is larger than the town of Lents, isn't it?

A. Yes sir, considerably.

Mr. WRIGHT: That is the district you are asking about?

Mr. MALARKEY: Yes sir.

Q. When you testify, for instance, that in 1906 there were eight teachers and a census of 505 in a ten-room building you mean there were eight school teachers in this district and 505 within the boundaries of that district, and that that district was served by a ten room building—you don't mean that there were 505 children in the town or district?

A. No sir.

Q. What are the boundaries of that district?

A. Section line road on the north to Clackamas County on the south?

Q. From the section line road on the north to Clackamas County on the south?

A. Yes sir.

Q. What is the distance across?

A. About two and a half or three miles.

Q. Two and a half or three miles north and south?

A. Yes sir.

Q. As to the east and west boundaries—where is the western boundary?

A. It is what is known as Wooden Street, between Woodmere and Tremont.

Q. Tremont is over here in the city, is it not?

A. It is half-way between Woodstock and Woodmere.

Q. Now, that is the western boundary—where is the eastern boundary of the district?

A. I think about 1½ or 2 miles east of there. Just east of Lents Junction.

Q. Do you know where Gilbert is?

A. Yes sir.

Q. Is Gilbert in that school district?

A. Gilbert is the center of District 45.

122 Q. What is the number of the district you refer to?

A. No. 12.

Q. There are a number of stations along the road from which children go to the Lents school house?

A. Yes sir.

Q. And do children go to Lents school house from stations west of Tremont?

A. No, that is another district.

Q. What stations are there from Lents to——

A. Third Ave., Sixth Ave., Ninth Ave., Grays Crossing, Reyburn Ave. and Woodmere.

Q. And these are all little stations at which the cars stop, are they not?

A. Just the same as in the city.

Q. The municipality of Lents does not complain, does it?

MR. AITCHISON: Lents is not a town—they have been trying to get incorporated as Arleta.

Re-examination by R. C. WRIGHT:

Q. Mrs. Eaton, you were asked about this contract, which came up incidentally—Do you know anything about them making a contract?

A. We had to make a contract to get cars at all—we had no cars for six months.

Q. Were you present when any negotiations were going on between the company and the people?

A. No sir.

Q. You don't know of your own knowledge what was said pro and con regarding the matter.

A. I saw the agreement people signed that they would pay this money.

Q. Was there any club or axe taken to force people to sign this contract?

A. I was not there to see.

O. R. ADDITON a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT:

Q. Where do you live, Mr. Additon?

A. Lents, Oregon.

123 Q. How long have you lived there?

A. The last time I have been there about six years. I lived there before that.

Q. You went there first in what year?

A. In 1893.

Q. Well, in 1901, how many stores were there in Lents?

A. I think only one——

Mr. MALARKEY: Of course, this is all understood that we object to the materiality and relevancy?

Q. What stores were there?

A. One, old Lents Corner owned by Mr. Gardner, and one by a lady, Mrs. Kerrigan—Grocery store.

Q. Since 1901 what number of stores have been put in there up to the present time?

Q. I have a list here. (Produces and examines document.)

Q. You may refresh your memory by calling off from your list—total number?

A. Forty three.

Q. Segregate them if you will, please. How many stores?

A. One ten room school, four drays, one physician, two —, four real estate offices, one hotel, one fuel company, six grocery stores, drug store, bakery hardware store, meat market, restaurant—two restaurants, livery stable, blacksmith shop, harness shop, shoe shop, billiard room, two wood says, two blacksmith shops, one woodyard, two physicians, one band and several lodges.

Q. Were all those establishments you speak of established since 1901?

A. Yes sir.

Q. Is there a local paper that circulates there?

A. None that circulates there, one established in Arleta.

Q. Is that the paper? (Indicates a newspaper.)

A. That is the paper.

Q. Do you take this paper yourself?

A. I do; yes sir.

Q. Do the Lents people advertise in this regularly, do you know? This is the issue of Sept. 12th, 1907. There is an editorial

124 on the first page, do you remember reading that?

A. I do not remember reading it.

Q. (Handing witness copy of paper.) Just look at that and tell us if you have read that article.

Mr. MALARKEY: Why should this commission wait while the witness reads a paper? I cannot see any reason why they should. I certainly am going to object.

Q. What have you to say in regard to the statements made in

this paper about the development and prosperity of that community?

Mr. AITCHISON: Let the witness testify.

Mr. MALARKEY: I object to that as being incompetent, immaterial and irrelevant.

Mr. AITCHISON: We will let the paper go in.

Mr. WRIGHT: We will introduce that peper. You have just read that article, Mr. Additon, are the statements correct or are they not?

Mr. MALARKEY: I object to that——

Mr. AITCHISON: That has been ruled upon. This is not a work of science.

Mr. MALARKEY: Let the witness tell what he knows about that.

Mr. AITCHISON: The paper may go in for what it is worth and will make it plaintiff's exhibit 1.

Mr. WRIGHT: Just look at all of these papers and say whether or not you have seen them before?

Mr. MALARKEY: If your Honor please, we would like to have your ruling on our objections. We object and we reserve the right to review. Upon what theory under the sun are these things offered?

Mr. WRIGHT: I have told you we wish to show that Lents has gone ahead on a five cent fare while Oak Grove has not gone ahead.

Mr. MALARKEY: If it does any good for the purposes of this case we will admit that Lents is bigger. What do you mean by "Lents", you say Lents is not a municipality? We learned from the lady who was upon the witness stand last that Lents embraces an area between two and a half and three miles north and south?

Mr. WRIGHT: That was District No. 12—not Lents.

125 Mr. MALARKEY: What is Lents?

Mr. WRIGHT: There is a little station out there run by your clients—that is Lents. There is a certain district of people who get on at a station called Lents.

Mr. AITCHISON: You have not given us any testimony to show the relative advancement of those communities.

Mr. WRIGHT: I have been interrupted so that I have not had more than time to introduce those circulars, and——

Mr. MALARKEY: I think that time might be saved by——

Mr. AITCHISON: What is your objection?

Mr. MALARKEY: We object to the line of testimony because the transportation to and from Woodmere and various other points, or the amount of real estate sold or unsold is not relevant to any of the issues involved here. If you want to show that Lents is prosperous, or that Lents is a larger place than Oak Grove, we will admit it.

Mr. WRIGHT (referring to answer to complaint): Now you have denied that one district here was more prosperous than another——

Mr. AITCHISON: The commission is ready to rule on the question: Evidence to show that one community has *been* prospered and another has not when that can be traced to a five cent fare or

ten cent fare is relevant, but we hardly think that this testimony—exhibits 2 to 6 are competent.

Mr. WRIGHT: I will say, if the commissioners please, I cannot get it in all at once. If I can get along further I can show it. Mr. Additon, were you in the real estate business?

A. I am, yes sir.

Q. How long have you been in that business?

A. About five years.

Q. Where have you been in that business?

A. At Lents, Oregon.

Q. Do you know the times that these different additions here—Woodmere, Arleta Park No. 2, Laurelwood, Firland and
126 Evelyn—were placed on the market for the sale of lots?

Mr. MALARKEY: I understood those matters the commission ruled——

Mr. AITCHISON: Give him a little lead to see if he can get that clear.

Q. You were there at the time and saw them placed on the market?

A. Yes sir.

Q. Have you, yourself, sold any lots in those additions?

A. I believe I sold a few in Arleta Park No. 2.

Q. You sold a few in Arleta Park No. 2 yourself?

A. Yes sir. Mostly what I sold out there were my own additions which I laid out myself.

Q. Which ones?

A. Evergreen Park, Abington, and then I laid our Mount Scott; part for parties who were non residents. Mount Scott however I laid out.

Q. Are these additions here in the vicinity of Lents? These we have just mentioned the advertisements of?

A. Well when we speak of Lents—Lents runs along from where the station is, runs east about half a mile and it is longer the other way. Lents proper, what is called Lents and the plat of Lents only shows I think somewhere about—not over twenty——

Q. You are speaking now of the plat of Lents?

A. Yes sir.

Q. I am drawing your attention to the station called "Lents" and the community which is generally known as Lents?

A. Well, there is only one Lents Addition and the other property adjoining it is——

Mr. WRIGHT: You don't understand my question: I am speaking not of the addition but of the community known as Lents. What district does that embrace?

A. Well, it would be hard to tell where it begun or where it left off.

Q. Do people living in these additions of which you have shown advertisements go to Lents to get on?

A. No sir.

127 Q. Do any of them?

A. Arleta Park No. 2 mostly go to Lents to get on.

Q. People from Arleta Park No. 2 mostly get on at Lents?
A. Yes sir, get on at Lents. 4th Ave., 6th Ave., Woodland Tract and 9th Ave.
Q. How far away are these little avenues you speak of?
A. About three blocks.
Q. Do people get on there from these additions—people who live in these additions—in the same manner that people get on the cars at the different blocks in the city of Portland?
A. Yes sir.
Q. Have you ever represented to prospective purchasers out there when trying to effect the sale of lots that they were five cent fares to Lents?

Mr. MALARKEY: I object to that as being incompetent, irrelevant and immaterial.
Mr. AITCHISON: Answer the question.

A. I have certainly always told them we had five cent fare.
Q. How far away from Lents station do the people who live at Laurelwood Addition, Firland, Evelyn and Woodmere take the cars of the defendant railroad to Portland?
A. Laurelwood and Milwaukee Ave. West get on the car all along the line—stations every short distance.
Q. Are there any other people engaged in the real estate business living at Lents or near the station?
A. Yes sir.
Q. Did you look at the statements made on these advertisements in regard to five cent fares; for instance, there is one?

Mr. AITCHISON: What are you handing the witness?
Mr. WRIGHT: Exhibit 3.

Q. Is that the general character of statements and representations made to prospective purchasers in and about Lents?
A. Yes sir; alluded to always.
Q. Is that a fair sample that is on these circulars here made by yourself and other real estate agents out there?

128 Mr. MALARKEY: We object to that. I do not see the relevancy. We object to this question. If this is a fair sample I object to this question.
Mr. AITCHISON: The objection is good.

Q. Withdraw the question and state it this way. Do you know, and if so, state whether or not prospective purchasers of lots in and about Lents are induced to buy those lots either in transactions made by yourself or by other real estate agents of which you have knowledge on the strength of representations regarding the five cent fare like those on these circulars?

Mr. MALARKEY: That would be a matter of hearsay testimony. That is the finding that is to be made by this commission and we object to the question.
Mr. AITCHISON: I think, provided it was not tied up, provided it was not so——

Mr. MALARKEY: Just let him ask what are the facts. What did you say?

Q. Did you ever make a statement like this to any prospective buyer of lots in and about Lents?

Mr. AITCHISON: Just let him tell in his own way. You may state in the language you use when you are talking about five cent fares.

A. It would be about on the same line as an advertisement would be. You see on these circulars a fair sample of what we tell them. We confine ourselves to the truth and do not exaggerate.

Mr. AITCHISON: Do you tell them you have five cent fare and other places do not have five cent fares? The long and short of it is you have five cent fares there and it is advantageous for them to buy where there is a five cent fare?

A. As far as the fare is concerned and other things being considered.

Mr. WRIGHT: Now, in regard to water works out there at Lents. Has there been any increase in capacity of water works?

Mr. MALARKEY: I object to the question as irrelevant, immaterial and incompetent. They are all argumentative—the fact to be proved is not that Lents has grown under five cent fare.

Mr. WRIGHT: So far as it being argumentative is con-
129 cerned, I never say anything so argumentative as this answer.

Mr. MALARKEY: They are all facts.

Q. State Mr. Additon the extent in either direction that Lents has grown due to the distance it is from the city and the lowness of the fares.

A. I do not know as I could say how much difference. In regard to the water works, we have two systems there. One is owned by Mr. Coffman. He has probably added $2,000.00 or $3,000.00 to his plant in the last two or three months. There is a demand and he has to supply the demand.

Q. State whether or not people are buying residences freely at Lents?

A. Well, there are several being sold every week.

Q. Is the market good there for the sale of property in and about Lents?

A. There is a demand for the property and a good many sales—you mean in houses and lots?

Q. Yes sir.

A. Yes sir, houses and lots, more especially lots.

Q. State whether or not there are more lots being sold there than acreage?

A. Yes sir.

Mr. WRIGHT: You can cross examine.

Cross-examination by DAN J. MALARKEY:

Q. Do you know where Nickum is?

A. An addition is——

Q. No, did you ever hear of Nickum?

A. It is on the Oregon City line.

Q. Don't you know where it is? A. Pretty nearly.
Q. Have you ever been at Nickum?
A. I have been past there but I never stopped there.
Q. What line is that on?
A. I suppose it is on the Oregon City line.
Q. That is as much as you know about Nickum then—that you think it is on the Oregon City line?
A. Yes sir.
Q. And you are a real estate man?
A. Yes sir.
130 Q. And you have been selling real estate?
A. Yes sir.
Q. And you have sold real estate on the other side of Lents too, haven't you?
A. East; yes sir.
Q. And you have sold lots on the Springwater division, have you?
A. Not a great ways out, no sir.
Q. You know where Lents Junction is, do you?
A. Yes sir.
Q. And you have sold lots between the Springwater division and what is known as Golf Junction?
A. No sir. That is on the Estacada line you mean?
Q. Yes sir.
A. No sir, I have not.
Q. You have ridden on that line haven't you?
A. I have never ridden on the Estacada line yet between Lents and Portland.
Q. And you do not know where Nickum is?
A. Well, I suppose it is somewhere on the Oregon City road.
Q. Did you ever hear of it?
A. Yes sir.
Q. What sort of a place is Nickum?

Mr. AITCHISON: You can develop that better elsewhere.
Mr. MALARKEY: I wanted to find out———
Mr. AITCHISON: He does not seem to show any competency on that point.
Mr. MALARKEY: That is just the point.
Mr. AITCHISON: I mean as to Nickum.
Mr. MALARKEY: Yes sir. That is all.

G. A. BRODIE.

G. A. BRODIE, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT:

Q. Mr. Brodie, where do you live?
A. I live about four miles east of here on the Powell Valley road.
131 Q. How long have you lived there?
A. Eighteen years.

Q. Were you formerly an officer and stockholder in what was known as the old Mt. Scott road—I don't know the name?

A. Portland, Chicago and Mount Scott Railroad, secretary.

Q. When was that?

A. That was about eight or ten years.

Q. Is the corporation still in existence?

A. It has never been dissolved.

Q. Are you still secretary?

A. Yes sir.

Q. Did you know at one time of there being made a contract out there in regard to five cent fares?

A. Yes sir.

Q. State whether or not the company voluntarily entered into that contract?

A. I presume they did—I don't know of any compulsion.

Q. Did you live out there in 1901?

A. Yes sir.

Q. Well, do you know whether—do you know anything about the state of traffic on that road just before this company or its predecessor took possession and ran it.

A. Yes sir.

Q. What was the traffic on that road at that time? Passenger traffic?

A. The passenger traffic was light. Car every hour and sometimes two or three passengers and sometimes not that until late in the day. At other times the cars were reasonably full.

Q. Were the cars over crowded at that time?

A. Not at all.

Mr. MALARKEY: Can you tell when that change was?

A. April 30, 1901.

Mr. WRIGHT: At the time the contract was made and the old O. W. P. took the road to run, did you notice the state and condition of the passenger traffic on the road after that?

A. Yes sir.

Q. You may state to the commission whether the passenger traffic has increased or decreased up to the present time?

132 A. Considerable increase all the time.

Q. Give the details as to the figures—number of cars, etc.

A. When they first put on cars they ran every half hour. Of course there were not very many people out there then. Began to grow very rapidly and then they put on twenty minutes service which has since been reduced to fifteen minute service, which they have now. Run cars very full now sometimes, as many as 125, 130 or 140 on a car.

Q. (Handing witness newspaper clipping.) There is a clipping from the "Oregonian" stating that cars were crowded there. State the facts in regard to the matter referred to in that clipping?

Mr. MALARKEY: We object to that because——

Mr. WRIGHT: We simply want to show there was a big traffic.

WITNESS: I have testified to that.

Mr. WRIGHT: Well, I want you to state as to the extent these cars are crowded.

A. I have stated they carry from 120, 125 or 130 at the present time.

Q. They carry 120, 125 or 130 passengers at the present time?

A. Yes sir.

Q. How about the traffic through the day?

A. Always full, even during the noon hour. Hardly get standing room on them—I mean during the noon hour hardly get sitting room.

Q. What is the regular time during rush hours?

A. Three and four minutes, and sometimes run trailers on them.

Cross-examined by DAN J. MALARKEY:

Mr. MALARKEY: You were the Secretary of the Portland, Chicago and Mount Scott Railroad, were you not?

A. Yes sir.

Q. And as such secretary you executed this contract in behalf of that company which I now exhibit to you (Exhibit No. 2)?

A. I signed a contract, I presume that is the same one.

Mr. WRIGHT: I wish to make objection of record to it, so that we don't pass it by. I don't want it understood that I admit it.

Mr. MALARKEY: And this is the contract to which you have referred in your testimony in answer to question propounded
133 to you by the attorney for the plaintiff, is it not?

A. I *that* that is what he referred to.

Q. (Extending Exhibit 2.) Look at this. Now, I want you to say whether or not this is the contract?

A. I referred in my answer to both contracts. The contract we first made was with the East Side Railway Company, and when this East Side Railway was sold to Morris Bros. and they threw up their contract and made this new one here themselves.

Mr. WRIGHT: This is part of their case and I think it is properly introduced when they put in their own evidence.

Mr. MALARKEY: Upon cross examination could we not show what contract or kind of contract the witness referred to? As a matter of fact your question really was not proper until you showed what contract you referred to.

Q. Mr. Brodie, have you—The Portland, Chicago and Mount Scott Railroad was organized principally by people who resided between Portland and Lents?.

A. Yes sir, that is correct.

Q. And the road they built extended from a point on Hawthorne Ave. out to Lents?

A. Yes sir.

Q. And the road which this Portland, Chicago and Mount Scott Railway Company so built from a point on Hawthorne Ave. to a point out to Lents is substantially along the same route as is now

maintained by the Portland Railway Light & Power Company over which its cars run from Hawthorne Ave. to Lents?

A. Yes sir.

Q. Now, drawing your attention in this connection, Mr. Brodie, to a plat which I now show you, and which is marked Exhibit 7——

Mr. WRIGHT (interrupting): The plaintiff does not admit the correctness of that map.

Q. I will ask you if the black line commencing First & Alder Sts. and continuing on out where marked Mount Scott Division with dotted line and running thence to Arleta, and thence to Lents, thence to Lents Junction, does not substantially represent the general
134 course and direction of the street car line as now operated by the Portland Railway Light and Power Company from 1st and Alder Streets to Lents and Lents Junction?

A. Yes sir. I don't know about the scale.

Q. Disregarding the matter of scale measurements I will ask you if this map does not substantially show the direction and route and distances.

A. Yes sir, I answered that.

Q. Between First and Alder streets and Lents Junction?

A. Yes sir.

Q. Now, I will ask you if the line as constructed and operated by the Portland Chicago and Mount Scott Railway Company as shown on the map as Mount Tabor Junction and run in this general direction to Lents? What is the distance, do you remember, approximately from Mount Tabor Junction to Lents?

A. 4½ to 5 miles.

Q. And this point which is marked Mount Tabor Junction is about at 48th Street and Hawthorne Ave.?

A. Yes sir.

Q. Now I will ask you if you are familiar with the general location of the Springwater division?

A. I have been on the line several times.

Q. Are you in a general way familiar with the Oregon City line which leaves 1st and Alder Sts. and then goes up on the east bank of the Willamette River to Golf Junction and thence to Oregon City?

A. I have been over it a number of times.

Q. Drawing your attention to plat marked plaintiff's exhibit 7. I will ask you if this shows in a general direction, not claiming that it is true to scale or shows the curves, the general direction of this defendant company's line—the Mount Scott division, to Lents Junction and then on out to Cazadero; and the one in blue, red and then blue—black, and marked Oregon City division is the line to Oregon City?

A. I presume for your purposes. The general direction is
135 not exactly right.

Q. The general direction is south?

A. Yes sir.

Q. We will now offer this plat marked exhibit 7 in evidence.

Mr. WRIGHT: We object to it as being incompetent, immaterial and irrelevant and as not made by a competent map man.

Mr. AITCHISON: Objection overruled.

Q. Mr. Brodie, when did the Portland, Chicago and Mount Scott Railway stop operating its line?

A. They never did operate it; they turned it over to the East Side Railway Company and they operated it.

Q. How long did the East Side Railway operate it?

A. Three or four years.

Q. Now, that was a different concern from this Portland City and Oregon Railway, was it not?

A. Yes sir.

Q. Refreshing your memory and to assure the commission, I will ask you if it is not a fact that it was a separate concern?

A. Separate concern altogether. Bought out the East Side Railway Company at foreclosure sale.

Q. The East Side Railway Company operated for three or four years and then they abandoned the line?

A. Somebody bought the East Side Railway Company's property and they refused to carry out the contract which the East Side Railway had with the Portland, Chicago and Mount Scott Railway Company and the line came back to the Mount Scott people.

Q. Then when they threw it up and the people who bought the track and refused to go on with it, how long was the period between then and the time this contract was made with this Portland Railway Light and Power Company?

A. They abandoned it the 1st of January and I think that 's dated 30th of April, is it not?

Q. Yes sir. It is dated April 30th. How long a period
136 during which there were no cars operated?

A. Cars operated within—first cars about six months.

Q. From approximately 1st of January, 1901, to 1st of July, 1901?

A. Yes sir.

Q. What fare was charged by the East Side Railway Company during the time it operated this line?

A. There was a provision in the contract with the East Side Railway whereby all subscribers were entitled to five cent fares.

Mr. WRIGHT: I move that be stricken out as incompetent, immaterial and irrelevant as part of the defense and not a proper cross examination.

Mr. MALARKEY: You went into the question of these fares and in order to——

Mr. AITCHISON: It does not matter how much to us as long as we get these facts.

Mr. MALARKEY: Are you ashamed of your witness?

A. No sir, he is a good looking man.

Mr. AITCHISON: I think these circulars have never been submitted in evidence? We will take it up later when you get done with the witness.

Mr. MALARKEY: Referring to this map, Mr. Brodie, marked exhibit 7: This point marked Mt. Tabor Junction is within the city of Portland, is it not?

A. Yes sir.

Q. And about how far is it along the line of the defendant street car company's southern line from Mt. Tabor Junction to the city boundary?

A. About one-half mile.

Q. You would not be accurate upon that?

A. It is a half mile between Hawthorne Ave. line and Section line.

Q. I will ask you if it is not a fact, Mr. Brodie, that from the city boundary line at the point where the car line of the defendant company from Portland to Lents crosses the city boundary line on out that car line to Lents, if it is not settled up pretty nearly like a solid city?

A. Yes sir.

Q. And there are settlements all along that line?

A. Yes sir, stores and dwellings.

137 Q. And they have stops every five or six hundred feet, do they not?

A. Yes sir.

Q. There has been a great deal of work done in that district by real estate agents in the last few years?

A. Yes sir.

Q. They have boomed that country pretty well, haven't they?

A. The country has boomed, I don't know whether it has been due to the real estate agents.

Q. You got in and got this company to give you five cent fares and they helped you out?

A. Yes sir.

Q. You know what Nickum is?

A. Yes sir.

Q. Is Nickum anything like Lents?

A. No, there is nothing there but a station. May be a few houses around it.

Q. Nothing much at Nickum?

A. There may be a few farm houses.

Q. No settlement such as around Lents?

A. Oh, no!

Q. Have you been to Oak Grove?

A. Yes sir, I have been to Oak Grove.

Q. Which is the larger, Oak Grove or Nickum?

A. Oak Grove.

Q. And how about Courtney?

A. There is more about Courtney than Nickum.

Q. And how about Risley? More people?

A. Not very many people right around Risley. Of course, farm houses——

Q. There are not many people right around Nickum?

A. No, I should say not.

Q. Are there not more people around Risley than Nickum?

A. I think there are more people near Risley than Nickum.

Q. And how about this place called Center—What would you say about Center?

A. I do not just remember Center.

Q. I will ask you, Mr. Brodie, (offering exhibit 7 for inspection) and referring to stations between Island and Concord, which
138 we enumerate—Milwaukee Heights, Courtney, Oak Grove, Center and Risley, and looking at Nickum station over here, I will ask you if it is not a fact that all of these stations have not more houses around them and are larger settlements than Nickum?

A. I should say so.

Q. I think that is all.

Re-examined by R. C. WRIGHT:

Q. Mr. Brodie, is there any competition between this road and other roads in passenger traffic at Lents?

A. Not between this road and other roads.

Q. I mean this road—defendant in this case?

A. No sir.

Q. Has it any competition in any way whatsoever in passenger traffic?

A. Not that I know of. There is no railroad competition.

Q. Is there any competition that you know of between this defendant in this case—Portland Railway Light and Power Company—for passenger traffic between Oak Grove and Portland?

A. Steamboat runs not very far away.

Q. Does it compete—ever see any one use it?

A. Not recently.

Q. They have since the railroad has been there?

A. Use it some but not to amount to much.

Q. They do use it some?

A. Not to amount to much.

Q. In your statement about Nickum, as a matter of fact to your own knowledge do you know anything about when the station was put in?

A. I only know it when I see it. I was through there a few weeks ago and saw the sign.

Q. Do you know anything about the station?

A. No sir.

Mr. AITCHISON: What was the first fare to Lents—five cents?

A. As a general fare five cents to subscribers of that original road.

Q. And to others, ten cents?

A. Yes sir.

Q. And that brought you how far?

A. Clear into town.

Mr. WRIGHT: One other question I will ask: You were asked if the country were not settled clear out to Lents. Your answer
139 was that it was settled up. State whether or not that was due to the five cent fare that the people settled there?

Mr. MALARKEY: I object to that. That is a conclusion witness

might draw but he don't know. I might think that I knew that to be a fact and not be a fact. I object to the question.

Mr. AITCHISON: He can tell what he knows of his own personal knowledge.

A. That was one of the factors—I don't know that it was the only cause.

Mr. MALARKEY: You do not undertake to say that if Oak Grove had a five cent fare it would be as large a place?

A. No, I don't know.

Q. It might become a good deal larger?

A. Yes sir, it might.

Q. It might become a larger place without a five cent fare?

Mr. WRIGHT: You don't think it is probable that Oak Grove would go away ahead the way Lents has?

Mr. AITCHISON: Ruled out.

Mr. WRIGHT: Call Mr. Johnson.

Mr. MALARKEY: I would like to ask the commission about what time they intended to adjourn? I would rather that you would not work right up to five o'clock. You are going to be here until Thursday afternoon, are you not? I wanted to ask if the commission could adjourn before five o'clock. It would be a convenience to me if they could.

Mr. WRIGHT: We have two witnesses here from Lents. Their evidence is not exactly cumulative.

Mr. MALARKEY: What do you expect to prove by Mr. Johnson? I will admit he will testify the same as Mr. Brodie.

J. J. JOHNSON, a witness produced on behalf of the plain-
140 tiff after being duly examined and sworn testified as follows:

Examined by R. C. WRIGHT:

Q. Where do you live, Mr. Johnson?

A. Tremont Place.

Q. Have you lived in that vicinity for any length of time?

A. I have lived in that immediate place for a little over two years. I was born at Mount Scott.

Q. You have been in that community nearly all your life?

A. Our farm place is about, a little over half a mile southeast.

Q. Are you familiar with the growth of the territory in and about Lents station?

A. Yes sir.

Q. State to the commission what has been the growth of that country—of the town of Lents since 1901 up to the present time?

A. Well, you mean with reference to the time this company took charge of the road? I can give it the best I know how. April 30, 1901, this road was already there in a way. The same car line transferred to Mount Tabor Junction. Very soon after the 1st of January they shut down and did not run until July 1901, about that time. I happened to be out there at that time—over at the farm—the first of February that was. I had to be away from home on account of circumstances from home and of course the

territory in my mind had greatly dwindled. I cannot recall named to be very definite. There was no growth at all. The prior company to this company and this company put on fairly good service but of course did not improve so rapidly for some time. I think that was due to the impulse of the people. Until——

Q. (Interrupting.) Do you remember the date a five cent fare was made out to Lents?

A. When the road was first originated, some fifteen or twenty years ago, they had some such arrangement.

Q. I mean the present company or its predecessors?

Mr. MALARKEY: They made it right from the time they took hold of it.

Q. I am asking you about the development of the country at the time?

141 A. Of course, you all appreciate the fact that there had been very dull times and times were very bad. I suppose that hurt a great deal. And, of course, the road being taken off hurt a good deal. Later, whether you subscribed or not, a five cent fare was given to everybody, and it seems the real estate men came in there then and of course began to boom that country and, of course, the main thing held out was five cent fare. I do not remember names but a great many persons were there. I would not live out there now unless it were for the five cent fare because you can get a place near for five cent fare. It was advertised on account of five cent fare. Real estate agents advertised it as being five cent fare and I think even on some of their posters was put on as one of the inducements on account of cheap lots. The fact that this—of course prior to that time it was a district, you might say, of brush all the way from Lents station clear to town excepting one or two points. After that it was cleared off and it surprised all of us. Just seemed houses went up in every direction. There were some few houses between Portland and Lents Junction. Then they put up store after store all the way out that line. It looks almost like a city.

Q. Look at these exhibits of real estate——

Mr. MALARKEY: You are not going to——

Mr. WRIGHT: He has just referred to posters. I want to ask him if this is the kind of posters.

Mr. AITCHISON: That general statement has gone in It is hardly necessary to introduce cumulative evidence.

A. Of course I could not definitely state.

Q. Have you seen advertisements of Arleta Park No. 2 district out there?

A. There has been all sorts of advertisements.

Q. The real estate men advertise as an important factor that there was a five cent fare out there?

A. Yes sir.

Mr. AITCHISON: I don't think we need go into it farther.

Cross-examined by DAN J. MALARKEY:

Q. Do you know where Nickum is?
142 A. You mean that place on the Mount Scott line?
Q. Yes sir.
A. I know it is on the Mount Scott line.
Q. There is no such development as on the Lents line, is there?
A. No sir. All I could see is a hill above the line—there is a cut there and you have to go up a stairway. I would not buy there.
Mr. AITCHISON: On account of the dissimilarity of the country? Do you think the country around Lents is better than it is around Nickum?
A. The soil around Nickum is not as good as around Lents. Oak Grove soil is good.
Q. How about the value of the land as acreage around Nickum as compared with the land around Oak Grove?
A. I don't know very much about the producing value of the land but I would say Oak Grove is the most valuable. But, as to the value of the land I could not testify.
Mr. WRIGHT: Is the character of the surface of the country around Nickum entirely different than around Lents?
A. The surface that I was over I would say that I think the character of the soil and the surface hilly. The road goes through a very deep cut and there is a very long step ladder goes up to the top of the bank. As to how many houses up there I do not know.

Mr. WRIGHT: Is it dissimilar on similar—Wright's letter 11/27/07 --to railroad being run through Sullivan's Gulch?
A. Something like that; may be more hilly than that.

A. W. MILLER, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT:

Q. Have you lived in and about Lents station?
A. I live this side of Lents about a mile—Tremont.
143 Q. How long have you lived there?
A. Since 1898.
Q. Were you at one time census taker for the United States Government?
A. I was census taker for the United States Government in 1900.
Q. Did you take the census of the Lents district?
A. Yes sir.
Q. Did you make the count?
A. Yes sir. Two districts in fact, Lents district and Woodstock district consolidated.
Q. What was the count you made of the inhabitants of the Lents district?
A. Lents district I haven't got separate. All in one.
Q. What territory did it embrace?

A. City boundary east six miles; from Powell Valley south to Clackamas County line, six miles square.

Q. Did it include all territory in and about Lents?

A. Yes sir.

Q. You will state the total population you made?

Mr. MALARKEY: I object to that as being incompetent, immaterial and irrelevant—six miles square.

Mr. WRIGHT: This will show the total population.

Mr. MALARKEY: What do you claim for this?

Mr. WRIGHT: Showing the population of Lents.

Mr. MALARKEY: It may include Lents.

Mr. AITCHISON: Go on and answer the question.

Q. What was the total number in that district?

A. 935 souls.

Q. And how many in and about Lents?

A. I do not know.

Q. Have you lived out near there since the year 1900?

A. Yes sir; oh, yes sir.

Q. Did you serve the Government as census taker for some little time?

A. They gave me, because my territory was the largest, two weeks longer than the others.

Q. Did you serve the Government continuously since that time?

144 A. As census taker? No sir.

Q. Having had the experience taking the census there, can you state in your opinion what the present population is of the district or community immediately in and about the station?

Mr. MALARKEY: I object to that. It is not subject to division and, in the second place there is no separation in the district.

Mr. WRIGHT: I will withdraw that question.

Q. From your experience as census taker can you state to the commission what is the probable population of a district one-half mile each side of Lents station along the railroad?

Mr. AITCHISON: He just said he could not give an estimate.

A. I could not make a division.

Mr. WRIGHT: I will withdraw that question.

Q. Do you know how many families living in and about Lents at the time you took the census?

Mr. AITCHISON: Within the district you mentioned?

Q. I am taking a district about one-half mile each side of the station of Lents.

A. At that time? I might make a rough estimate, perhaps one hundred families. I understood you took Lents as a center and radius of one mile?

Q. One half a mile?

A. Be less, perhaps fifty, or seventy five families.

Mr. AITCHISON: What is your judgment as to how many families are now in that territory?

Mr. MALARKEY: That is what we objected to. It is not a matter of information upon which testimony can be received.

Mr. WRIGHT: He has been a census taker, therefore has had some experience counting. Now, if you want to quit at this time I will not object.

Mr. AITCHISON: The exhibits 2½, 3, 4, 5 and 6 are offered in evidence by plaintiff and objected to by the defendant.

Mr. MALARKEY: They are incompetent, irrelevant and im-
145 material and are hearsay testimony. We have had no opportunity to examine anybody making these statements.

Mr. AITCHISON: Objection sustained. Excepted by plaintiff.

At the hour of 4:45 p. m. October 28, 1907, adjournment was taken until 9:30 a. m. October 29th, 1907, at the same place.

Pursuant to adjournment commission met at the hour of 9:30 a. m. October 29th, 1907, present the same as yesterday.

B. LEE PAGET, a witness produced on behalf of plaintiff, after being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT:

Q. Where do you live, Mr. Paget?
A. Oak Grove, Clackamas County, Oregon.
Q. How long have you lived there?
A. A little over a year.
Q. Are you the president of this Oak Grove Improvement Association, the plaintiff in this case?
A. Yes sir.

Mr. WRIGHT: Now, I would say to counsel for defendant that I wish to avoid the necessity of calling a witness here on that Lents question to establish the fact that they have telephone and light service. In the haste of yesterday I overlooked that. I think Mr. Fuller knows they have those. Are you willing to concede that to be a fact? We will stipulate then by agreement that the testimony of Mr. Additon, who was on the stand yesterday, if called today would testify to the effect that there is a telephone and electric light service in the stores and private houses in a district half a mile in circumference around Lents depot.

Mr. AITCHISON: One half mile in circumference?

Mr. WRIGHT: One half mile each way.

Mr. AITCHISON: That would be ¼ of a mile each way. You mean radius?

Mr. WRIGHT: Yes sir. Within a radius of one half mile.
146 Such testimony is offered at this time. You agree that such testimony would be given and make no objection to it?

Mr. MALARKEY: Why, yes sir. I would stipulate a great many more things. I will stipulate that Lents is larger and more prosperous than Oak Grove in every respect. What more do you want?

Mr. WRIGHT: Mr. Paget obtained some data from the directory people as to the population out there and if you will allow him to offer the testimony as to the present population——

Mr. MALARKEY: Of what?

Mr. WRIGHT: I think he has the statistics there.

Mr. MALARKEY: Let me see it.

Mr. WRIGHT: He has just a little memorandum there. Have you the districts down there?

Mr. MALARKEY: If you want to stipulate that Mrs. Clinton would testify that the facts are as stated on that card——

Mr. WRIGHT: Mr. Paget obtained them and he will have to state what they are.

Mr. MALARKEY: Do they show there? Did you get the information from the directory here? You do not know of your own knowledge that there are that number of people in that district?

WITNESS: I know it just as much as if I looked into the city directory.

Mr. MALARKEY: No, you—you might know that I might live in some residence——

WITNESS: I may know it by reference to the directory.

Mr. MALARKEY: Well, I object to his statement as to what Mrs. Clinton said then.

Mr. WRIGHT: We will have to call her then.

Mr. MALARKEY: Call her then.

Mr. WRIGHT: I am unable to state exactly what she said to get it down on the record.

Mr. MALARKEY: There are the facts. It is all nonsense.

Mr. WRIGHT: I have not looked at the card.

Mr. MALARKEY: Look at it then.

Mr. WRIGHT: I cannot make it out from this.

Mr. MALARKEY: I can.

147 Mr. WRIGHT: That is all right, but——

Mr. MALARKEY: I objected to this course you have pursued——

Mr. WRIGHT: Just withdraw all that about stipulating with regard to the directory. I want a direct agreement as to what Mrs. Clinton's testimony will be and that card is not definite enough. That is the point I am making. You want me to go into something indefinite.

Mr. MALARKEY: I do not think any of it is relevant. It is silly.

Mr. AITCHISON: Let us go on, gentlemen.

Mr. WRIGHT: Mr. Paget, have you ever travelled over the lines of the defendant company from Lents to St. Johns?

A. Yes sir.

Q. State, if you know, what fare is demanded and collected by the defendant company for the transportation of passengers from Lents to St. Johns, Portland Heights, Milwaukee Heights, Thurman St., Terminal Yards, Mt. Tabor, Albina Ave., Montavilla, Irvington, Russell St., Fulton, Hamilton Ave., Jefferson St., Loncoln St., Montgomery, St., Northrup Street?

Mr. MALARKEY: We object to that as being incompetent, immaterial and irrelevant, and because it is not shown that these are the lines of the Portland Railway Light and Power Company. As a matter of fact these lines are the lines of the Portland Railway Company and it is a seperate corporation entirely. Just because counsel says——

Mr. AITCHISON: Let it go in subject to the objection.

Mr. MALARKEY: I would like to ask Mr. Paget again at this time bearing upon this question——

Mr. WRIGHT: I am examining this witness. Suppose I have a little opportunity to do that myself.

Mr. AITCHISON: Do you want to develop his competency on this objection? We will sustain the objection until you delevop competency.

Mr. WRIGHT: When passengers take the cars of the defendant at Lents to go to the places I have just mentioned to you, does the defendant company sell them transportation to those places from Lents?

A. Yes sir.

148 Mr. WRIGHT: Now then, do you want to ask witness a question?

Mr. MALARKEY: I understood that objection to the other question was sustained. You say you know this of your own knowledge.

A. Yes sir.

Mr. MALARKEY: Did you ride from Lents to the terminal of the company's line on Portland Heights?

A. Yes sir.

Mr. M.: How long ago did you make that trip?

A. Any time within the last twelve months.

Mr. M.: What time within the last twelve months?

A. Not more than once.

Mr. M.: You are testifying to your own knowledge?

A. Yes sir.

Mr. M.: You will swear now that you have ridden from Lents within the last twelve months from Lents to the terminal at Portland Heights; that is true, is it?

A. Well now, Mr. Malarkey, I think perhaps I will modify that. I think I will modify that.

Mr. M.: This is where we want facts, Mr. Paget, of your own knowledge.

A. No, I don't think I have. Not within that period to that part of the line.

Mr. WRIGHT: Mr. Malarkey——

Mr. MALARKEY: Just a minute, I am doing this examining. Have you ridden on the lines of the Portland Railway Light and Power Company from Lents to Willamette Heights?

A. I have ridden, Mr. Malarkey, from Lents to certain of those points mentioned there in that complaint. I have never had any difficulty in getting my transfer to any of those points I have ever asked for. I think I am fair in assuming in taking for granted, that the company is issuing transfers according to regular——

Mr. MALARKEY: We do not want assumption—we want facts. This is a judicial proceeding and we want your own knowledge. To what termini of the places enumerated by Mr. Wright—to what points have you ridden from Lents by use of a transfer given to you when you get to First & Alder streets?

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A. St. Johns, Russell St., Albina Ave. Those are the only ones I have recollection of riding the entire distance from Lents.

Mr. M.: Did you make these rides by riding the entire distances for the purpose of making a witness in this case?

A. No sir.

Mr. MALARKEY: Then for instance as to testifying you were mistaken you did not testify to your own knowledge?

Mr. AITCHISON: The objection to that question was sustained and the answer was not made.

Mr. MALARKEY: You sustained the objection to the question witness had ridden over the lines of the defendant company. Then Mr. Wright asked this question: Whether or not witness had ridden from Lents by transportation given to you by the defendant company from Lents.

Mr. AITCHISON: The question was whether defendant company sold such transportation.

Mr. WRIGHT: That was the question.

WITNESS: I would like to add to my ansyer to that question. The fact that from time to time the company has issued little booklets giving the details as to their transfer system and some of these points are covered in that transfer booklet.

Mr. AITCHISON: If there is no question about that fact can you not develop the fact.

Mr. MALARKEY: Object to this—in witnesses testifying to something they do not know of their own knowledge. I object to a man testifying to what he does not know and the commission has no right to consider anything except competent evidence.

Mr. WRIGHT: He has testified that he has ridden from Lents to St. Johns and one or two other places here anyhow.

Mr. AITCHISON: Proceed, Mr. Wright.

Q. Have you ridden between St. Johns and Lents at any time?

150

A. Yes sir.

Q. What fare was charged to you and collected for the entire distance?

A. Five cents.

Q. Have you measured on the maps or obtained any information that you can testify to regarding the distance of St. Johns from Portland? If you have, state what the distance is.

A. I tried to ascertain the distance from St. Johns to Portland but was unable to obtain the information when I enquired at the company's offices. I enquired from one or two conductors as to what their ideas were as to the distance and I was told it is about nine and one-third miles.

Wright's letter 11-27-'07.

Q. Did you make any measurements?

A. No sir.

Q. Are you sure you did not measure that off on a map at any time?

A. I think I made some comparison on one of the company's maps. Just a rough approximate, comparing that distance according to scale on another line.

Q. Simply an approximate measurement?

A. Yes sir.

Q. Did you ever measure it up with a real estate map like that one hanging on the wall?

A. Yes sir.

Q. Was that real estate map you say you measured it on drawn to a scale?

A. Yes sir.

Q. Did you follow that scale in making your measurements?

A. Yes sir.

Q. Now then, you may state whether you have ever ridden from Golf Links to St. Johns?

A. Yes sir, I have ridden with St. Johns transfer but I have not ridden to the end of the line—I have not ridden actually to St. Johns.

Q. What kind of a transfer did you get?

A. The transfer I received entitled me to ride to St. Johns.

Q. From the Golf Links to St. Johns?

A. Yes sir.

Q. What was the fare charged and collected of you by this defendant company for transportation from Golf Links to St. Johns?

151 Mr. MALARKEY: We object to that as being incompetent, immaterial and irrelevant. It is admitted that Golf Links is within the city. The lines to St. Johns are all within the city.

Mr. WRIGHT: We do not admit that St. Johns is in the city.

Mr. MALARKEY: You do not admit that the St. Johns lines are in a city?

Mr. WRIGHT: All in a city—Portland and St. Johns.

Mr. MALARKEY: Certainly I admit that, and their boundaries come right together. That being the case what does that have to do with this case?

Mr. AITCHISON: Let it go in subject to the objection and we will consider it later.

Mr. WRIGHT: We want it in the records so that we can have something to argue on.

WITNESS (answer): Five cents.

Q. Have you ever ridden from Golf Links to the Union Depot, Terminal Yards, Mount Tabor or any of these other terminal places I mentioned a few moments ago?

A. Yes sir.

Q. What was the fare charged at those times?

Mr. MALARKEY: I will make the same objection because these places referred to are all within the city.

Mr. WRIGHT: You are right; I will withdraw that question.

Mr. WRIGHT: Have you ever ridden from Oak Grove, Center, Courtney or Milwaukee Heights to St. Johns or any of these other places I mentioned a few moments ago?

A. Yes sir.

Q. When you rode over the lines of the defendant state what fare you paid to reach these places?

Mr. MALARKEY: I object to this question. These places are all outside of the city. The way you framed your question you asked whether he had ridden from these various places to St. Johns. He says: "Yes sir." Now which one it is we do not know. In other words——

Mr. WRIGHT: We will withdraw the question to save time.

Q. Have you ridden from Center to St. Johns or any other of these other places?

152 A. Yes sir.

Q. Have you ridden from Oak Grove to other places?

A. Not from Oak Grove as a starting point. I have ridden from Oak Grove going through it.

Q. Where did you start from?

A. I started from Center. My home station is Center I go through them——

Q. You say you go through them. Do you refer to Oak Grove, Milwaukee Heights——

A. Yes sir.

Q. Now, when you go from Oak Grove passing through what fare did the defendant company charge you and collect from you to reach these places?

A. In answering that question I am going to answer it first of all: The fare I paid originally until I got onto some certain kinks, which by experience I learned about, as an uninitiated patron of the line without any advices and without being told, I paid twenty cents in riding those distances.

Q. State the parts of that fare collected of you. Was it all collected at once, or in portions. Explain how you paid?

A. I paid the fare in portions.

Q. Go on and explain how you paid the fare?

A. The fare from Oak Grove to First & Alder Streets is fifteen cents and no transfer is allowed on that fare at all so that for the change distances you have to pay another five cents.

Mr. WRIGHT: Are those simply fares you have paid, or do they have to be paid by others who travel over the defendant's lines to these other places mentioned a moment ago?

A. Yes sir, on a one fare basis.

Q. And coming through from those places to Center, what fares are charged?

A. The same each way.

Q. Does one fare paid include a transfer?

A. If you happen to have gotton onto the fact that by purchasing a ticket for part of the way and at that point paying again you

153 are able to get a transfer but it is only those who are experienced that the benefit is obtained.

Q. Did you receive this letter from the defendant company? (Exhibits letter.)

A. Yes sir.

Q. I suppose it will be admitted that is Mr. Fuller's signature?

Mr. MALARKEY: I do not know whether it is or not; let me see it.

Mr. WRIGHT: I would say to counsel that I am not offering that for any of the contents of the letter—we merely offer this letter head to show the names of these companies and not for the matter contained in the letter.

Mr. AITCHISON: We had better read it into the record.

Mr. WRIGHT: The plaintiff offers exhibit 8, a letter head of the defendant company for the purpose of showing the name of the defendant company at the top thereof in large type "Portland Railway Light & Power Company" and below it the names of the following corporations: "Portland Railway Company," "Oregon Water Power & Railway Company", "Portland General Electric Company", "Vancouver Electric Light & Power Company". The plaintiff also offers all testimony in regard to fares from any points to St. Johns for the purpose of showing that the defendant sells transportation to the public from those points to St. Johns, and also for the purpose of comparing charges made between St. Johns, a point without the city of Portland, and points within the city of Portland.

Mr. MALARKEY: Let me understand with reference to this letter. As I understand it, the whole letter is received. A person cannot introduce a part of a document, it must be all or none.

Mr. WRIGHT: I submit it only for the letter head.

Mr. MALARKEY: That may have been the particular motive you had in introducing the letter, but as I understand it——

Mr. WRIGHT: I will take leave to substitute a blank letter head.

Mr. MALARKEY: We would object to that. I would like to have an understanding. What we object to is that we want to understand the whole thing. You cannot introduce a document and have a part considered and——

Mr. WRIGHT: Exhibit 8 is offered by the plaintiff with
154 leave, by courtesy of the commission to substitute a sheet of the same character without the written matter.

Mr. M.: The only thing written in it which is competent is Mr. Fuller's signature. If you want to introduce the letter you are perfectly at liberty to do so.

Mr. WRIGHT: I simply wish to show the names of these companies——

Mr. AITCHISON: The object of the letter is to show there is common management for all these corporations?

Mr. WRIGHT: As far as that is concerned——

Mr. AITCHISON: The whole letter ought to go in. Let the whole letter go in.

Mr. WRIGHT: Mr. Paget, you signed the complaint in this case, did you not?

A. Yes sir, I did.

Q. When you were making up the list of these fares enumerated

in the complaint to various places, as for example, Lambert, where the fare paid is more than five cents, for example, fifteen and twenty cents, there is a difference between that list and the one offered by defendant, is there not?

A. Yes sir.

Q. Will you please explain that difference?

A. I have copied these figures from the company's printed schedules but there is a difference of five cents which was explained probably in my answer to a former question. There is a way in which you may get a corresponding reduction of five cents.

Q. I am speaking now of these rates to other points that are not on the line where Golf Links is; where there is, for example, fifteen cents in their list to Sycamore station, does that include the price of a transfer to the city? There is a difference of five cents in your complaint and the answer?

A. Yes sir. Both amounts include the price of a transfer, providing fare is paid as I explained awhile ago—pay to transfer point and from there on.

Q. Does that explain the differences in these figures in the two documents in the case?

A. Yes sir.

Q. Are you a school director in the Oak Grove district?

A. Yes sir.

155 Q. Do you know what the present school attendance is in that district?

A. Yes sir.

Q. Will you please state what it is?

A. The present school attendance in that district is seventy.

Q. Do you know what the attendance had been in that district in past years?

A. I know what the school census has been.

Q. Can you state that census?

A. Yes sir.

Q. Then please do so.

A. In the year 1903, there were 65; in 1904, 65; in 1905, 80; in 1906, 93; in 1907, there were 98.

Q. How many teachers does the district employ?

A. We employ two teachers in that district.

Q. How many have been employed in past years in that district?

A. Two teachers.

Q. In those years you have referred to——

Mr. MALARKEY: He has only lived in that district one year.

WITNESS: I could answer from the records.

Mr. AITCHISON: I think if he is an officer of the school district and has access to the records he is qualified to testify to them.

Mr. WRIGHT: He is a school director now.

Q. Have you any electric lights in Oak Grove or Center?

A. In the residences, you mean?

Q. Yes sir.

A. No sir.

Q. Have you any electric lights in the residences at Courtney?
A. No sir.
Q. Is there any telephone service there to stores or private houses?
A. No sir. There is just one public telephone connection made with the principal store to the long distance line going through to Oregon City.
Q. Did you take up with the electric light company the matter of obtaining electric lights for Oak Grove?
156 A. Yes, sir, very vigorously.
Q. Please examine those letters there and state whether or not those are the letters you received from the representatives of that company?
A. Yes sir, those are some of the letters.
Q. One of these letters is a copy—is the original letter here? If there is any objection to the copy we will simply introduce the other letter—this being a carbon copy of Mr. Paget's letter to the company. If you object to his copy we will simply introduce the other.

Mr. MALARKEY: We object to all of these letters as being hearsay testimony. They are incompetent, immaterial and irrelevant.
Mr. WRIGHT: You will admit the signature of the gentleman on the bottom, will you not?
Mr. MALARKEY: No sir. We will admit it, that is to say, if the letters are relevant.
Mr. WRIGHT: You do not mean to say——
Mr. MALARKEY: If it is a matter of fact to put witnesses on the stand here and they testify to what somebody else said to them——
Mr. WRIGHT: This is a statement made by this same company——
Mr. AITCHISON: Objection overruled.
Mr. MALARKEY: Defendant is not the General Electric Company.
Mr. WRIGHT: It is on the letter head of the Portland General Electric Company.
Mr. WRIGHT: We offer that for the purpose of showing the efforts made by the plaintiff association to obtain electric lights in that vicinity.
Mr. AITCHISON: Well, if they are offered for that purpose the objection will have to be sustained.
Mr. WRIGHT: It is offered in both ways—offered for all purposes. We are simply calling attention to this one name on the letter head.
Mr. AITCHISON: Let the letter go in.
Mr. MALARKEY: There is no use to take exceptions.
Mr. WRIGHT: Mr. Paget, did you have any conversation
157 with the defendant company with regard to these lights?
A. We had very considerable correspondence with the representative of the electric light company.
Q. Did you have any conversations with the representatives of the electric light company?
A. On one or two occasions they sent men out to the meeting of our improvement association, and at another time they sent a man or men out there to canvass the territory and solicit names for subscriptions to ascertain possible business out there.

Q. Was this matter of electric lights taken up by your association or by you personally?

A. The matter of electric lights was taken up with the company both by the association and by me personally. Also the matter of motive power was taken up in connection with it.

Q. Mr. Paget, you may state what you know about the visits received by people who reside in Oak Grove, Center and Courtney from friends who live in the city, whether frequent or otherwise?

A. It is an expensive luxury, very.

Q. What is the reason they do not go out very frequently?

Mr. MALARKEY: I think I will object to that.

Mr. AITCHISON: Let him answer if he knows.

Mr. MALARKEY: It will be pretty hard for Mr. Paget to testify to what people of common sense know he does not know.

Mr. AITCHISON: It is a matter of general notoriety. Answer if you know, Mr. Paget.

A. I know my friends claim they cannot afford to come out but that they would like to; they cannot afford to from the fact it is such a costly trip. For instance, if a family of four people want to make the trip out and return they would have to spend a dollar or two.

Mr. MALARKEY: It would be just so much more if you lived at Oregon City.

158 Q. What is the expense of your family for fares over this line between where you live and Portland.

A. Street car fares between my home and Portland for my family cost me $20.00 monthly. I am paying tribute to the company for car fare $20.00 per month.

Q. State to what extent the population of Oak Grove, Center and Courtney do business in Portland daily?

A. What percentage?

Q. Yes sir.

A. A large proportion of them do.

Q. What proportion would you say?

A. I do not think I would attempt to make any specific estimate, Mr. Wright.

Q. Is there much business done in these three places I mentioned?

A. No sir. The extent of the business is only small, one small grocery store. There are two, one of which is very small though.

Q. These places I have just mentioned, are they all stopping places for the cars?

A. Yes sir.

Q. Is there a local newspaper published at any of these places?

A. No sir.

Q. Is there any competition by any other transportation line for this travel of persons between Oak Grove, Center and Courtney and the city of Portland.

A. No sir. Not even the devil wagons we heard of yesterday.

Q. Do you know whether there has been any complaint in regard

to the high fares causing families to leave there, and, if so, state what you know?

Mr. MALARKEY: We will object to that for the same reason we have objected to other questions—that it calls for hearsay testimony.

Mr. WRIGHT: I will withdraw that question and frame it *it* another way.

Q. Do you know whether any families have left Oak Grove, Center or Courtney because of any complaint as to the fares charged between Portland and those places?

A. I know of a person or two and have heard of several others who left for that reason.

Q. How long did you live there?

A. A little over a year.

159 Q. Have you noticed any increase in the population during that time?

A. No sir, I have not noticed any material increase during that time.

Q. Have you ever been in St. Johns to any extent?

A. Yes sir, quite considerable.

Q. Do you know anything about the increase in population there?

A. Yes sir.

Q. Has the increase at St. Johns been large or small?

A. The increase has been very large at St. Johns.

Q. Do you know anything about the increase of houses and business places there? If so state what the increase has been.

A. The increase has been so great as to be the talk of the city and county, and state almost.

Q. A great deal was said about Nickum here yesterday. Do you know anything about that place?

A. Yes sir, a little.

Q. Will you please state what you know about it?

A. One thing I know about it is that it is a point considerably beyond the city limits and the company granted them a five cent car fare. Another thing I know is that the line goes through a deep cut there, and if I am correctly informed, it was very expensive to build.

Mr. AITCHISON: May I ask a question, Mr. Wright? This cut at Nickum goes through a sort of precipitous hill, does it not?

A. Yes sir.

Q. And you climb up a stairway and the hill slopes off in all directions, does it not?

A. I have never been up there, I just saw it from the car line.

Mr. WRIGHT: Mr. Paget, you may state in a general way in regard to the growth of Oak Grove, Center and Courtney, or the country immediately tributary to those stations as to passenger traffic.

Mr. AITCHISON: During what time, Mr. Wright?

Mr. MALARKEY: Do you know anything about that of your own knowledge?

160 A. No sir, I do not.

Mr. MALARKEY: Counsel should not have asked that question.
Mr. WRIGHT: I withdraw that question.

Q. Speaking of that Nickum question: Do you know anything in regard to the service out there?
A. Yes sir.
Q. What is the service there?
A. The first car coming in from there to Portland in the morning reaches Portland four minutes past 9:00 and there are six more cars run over the line from there during the day and night at more or less irregular intervals and not less than about two hours at any one interval.
Q. What is the present service as to time from Oak Grove, Center and Courtney?
A. They have twenty-five minute service except late in the evening. All day long they have 25 minute service.

Cross-examined by Mr. MALARKEY:

Q. Mr. Paget, you live at Center, do you not?
A. Yes sir.
Q. You have lived there a year, have you?
A. Yes sir.
Q. Center is on the Oregon City division of the defendant railway company, is it not?
A. Yes sir.
Q. It is between Portland and Oregon City, isn't it?
A. Yes sir.
Q. The other points referred to—Courtney, Oak Grove and Risley are also on that division, are they not?

Mr. WRIGHT: I did not refer to Risley.
Mr. MALARKEY: Did you not?
Mr. WRIGHT: No sir.

Mr. MALARKEY: The car service you have along there is the same car service they have in Oregon City, is it not?
A. Yes sir.
Q. That is to say, every car passing going south passes those stations going to Oregon City, do they not?
A. Yes sir.
Q. And every car going north to Portland passes through those stations, do they not?
161 A. Yes sir, with occasional exceptions. I understand some of the cars originate at Gladstone. I do not know but I understand so.
Q. What I want to get into the records is this fact: That you have no special service on the line up to those points For instance such as that to Milwaukee, where they have a car that goes to Milwaukee and back?
A. Same as Laurelwood.
Q. Now, Milwaukee Heights is how far from Portland? Are you familiar with the distances?
A. The distance is 8.69 miles.

Q. That is the distance from Milwaukee Heights to Portland, is it?

A. Yes sir.

Q. And how far is it from Courtney to Portland?

A. I will have to look that up. However, the mileage is stated in the complaint and answer.

Mr. WRIGHT: I checked them up and there were no differences.

Mr. MALARKEY: Then I understand you admit the mileage as stated in this answer are correct, do you?

Mr. AITCHISON: Are they the same as they are in the tariffs?

Mr. MALARKEY: Yes sir.

Mr. MALARKEY: This company did not ask you to move out there, did they?

A. No sir.

Q. What was the fare then, was it the same as it is now?

A. Yes sir.

Q. You knew w-at the fare was, why do you say the company was levying tribute?

A. I did not say "levying"; I said I was paying tribute.

Q. What do you mean by that? You know as a matter of fact if Oregon City had a five cent fare they would like it?

A. Yes sir, Oregon City would like a five cent fare to Portland.

Q. Do you not think that if Center got a five cent fare that the people at Risley would complain?

A. I have nothing to do with that.

162 Q. Would not the people at Concord, which is less than a mile beyond, also complain?

A. I have no interests at Concord.

Q. Have you any interests in Lents?

A. No sir.

Q. Have you any interests in St. Johns?

A. No sir.

Q. You are simply interested in getting reduced fares from Center?

A. Yes sir. I am interested, Mr. Malarkey, that myself and my neighbors get from the company the same fares and the same consideration that people in other places similarly situated get.

Q. Do you not think, applying the same principles and applying the Golden Rule, do you not think that your neighbors at Concord, Risley and at Naef should get the same as you are asking for?

A. All that we are asking for is the application of the Golden Rule.

Q. You are here asking for five cent fares?

A. Yes sir.

Mr. AITCHISON: I thought you were asking for ten cent fares?

A. We are asking for five cent fares.

Mr. MALARKEY: Do you really think, Mr. Paget, that you ought to have five cent fares?

A. Yes sir.

Q. The distance to Oak Grove is 8.48 miles, and do you not

think if you got a five cent fare to that point that the people at Risley would think that they ought to have a five cent fare also?

A. I think we said so in the complaint.

Q. Then you are asking for a five cent fare to Risley, 9.26 miles, are you?

Mr. WRIGHT: You are mistaken, Mr. Paget.

Mr. PAGET: All right, it is my mistake. Mr. Malarkey, let me say in answer to your question that, considering the fare granted to our friends at Lents there would be nothing unreasonable in the conclusion.

Mr. AITCHISON: Do you make a claim that the rate charged you is of itself at the present time unreasonable?

A. Yes sir.

Q. Or only by comparison?

A. Yes sir; I think this whole case——

163 Mr. MALARKEY (interrupting): Shows that the claim of the plaintiff in this case is that the rate is unjustly discriminatory when compared with other places?

A. Yes sir.

Q. You do not undertake to claim that the fare for over eight miles is unreasonable?

A. That is not in the case.

Q. You do not claim here in this case that the charge of 15¢ to these places to Portland is in itself, in comparison with other fares which you have cited, to Lents or St. Johns, is excessive or unreasonable; do you?

A. Yes sir, that is right.

Q. You do make that claim, do you?

A. Yes sir; we do.

Q. You claim that 15¢ for carrying people eight miles is unreasonable and an excessive charge, do you?

A. It would be simply an expression of opinion anyway.

Q. Well, I know that, but what we want to discover is, what is the basis of the complaint?

A. I have stated distinctly, Mr. Malarkey, the complaint is that the basis of rates is extremely discriminatory.

Q. And nothing else? That is what we want to know. In other words, suppose, Mr. Paget, suppose there was no Lents and no St. Johns?

A. As an abstract proposition I would not think it an extremely high rate.

Q. If there were no Lents or St. Johns the rates you complain of would not be, in your opinion, unreasonable nor excessive, would they?

A. I do not know about that. A line between a suburban point to the center of the city is a different thing from a line going to country points.

Mr. AITCHISON: The statutes under which this complaint is based provide that on complaint, and so on, that any of the rates, fares, and so on, are unreasonable and excessive or unjustly discriminatory.

Mr. PAGET: Yes sir, I see.

Q. Now, what we are trying to discover is whether you are being unjustly discriminated against or that the fact that the fare itself is unreasonable.

164 Mr. PAGET: I see the point. I think our complaint as filed is based upon the second charge there.

Q. That it is unjustly discriminatory?

A. Yes sir.

Mr. MALARKEY: Would you expect us then, regardless of there being any discrimination—suppose there were no Lents line?

A. That is taking up an imaginary situation.

Q. We were attempting to ascertain what was a reasonable rate.

Mr. WRIGHT: If you were attempting to ascertain what was a reasonable rate it seems to me you would look to see what this company were doing under similar conditions.

Mr. MALARKEY: And the burden would be upon the plaintiff to maintain the charge. Then, in view of the statements made by Mr. Paget that this complaint here is based upon the charge only that the rates are unjustly discriminatory——

Mr. WRIGHT (interrupting): I wish to say that our position upon this complaint is that we also, as compared for example with another institution—you may call it separate—where there is five cents charged for a distance of 9.37 miles. Now then, if another company, say this is a separate corporation, *d*an do that this company can certainly undertake to do suburban business if it is the only line running out to Oak Grove for the same rate they will transfer people for from St. Johns. What we want is a basis of comparison to make our proof to base it upon.

Mr. MALARKEY: I think this thing should be settled here and now by the commission. I do not think anybody can read that complaint and consider it as anything but a complaint. The gist of the complaint is that the rates charged by defendant to these complaining points—Oak Grove, Center and Courtney are unjustly discriminatory, though it is true the word "unreasonable" is used there. Suppose a person comes in here and presents a complaint to say that a rate is unreasonable, then he must offer some evidence in proof of it. Now then the question of the reasonableness or unreasonableness we are not prepared to try and have not considered it

165 at any stage. We did not consider that anybody would complain irrespective of comparison.

Mr. AITCHISON: The principle is certainly broad enough to cover all of it. Complain-t alleges in Paragraph 6 that the rates, fares and so on should be no greater than five cents for one trip and then he goes on and says so much higher fares are charged than for equal and greater distances.

Mr. MALARKEY: As I understand, it was that they undertake to say that the fare was unjustly discriminatory. I think the statement of Mr. Paget shows clearly that there was not anything else in their mind at the time.

Mr. AITCHISON: You can see the importance of it to us, Mr.

Wright. It involves the reasonableness per se of fares to Oak Grove. It would necessarily involve the rates beyond there.

Mr. WRIGHT: I am prepared to take those matters up in argument, and as I say, it is impossible if you had just that one line—if this company had just one line running to Oregon City it would be impossible to avoid comparison. You must drag in comparisons at some time.

Mr. AITCHISON: That, of course, would be a very essential element in the proof. And, if we found that the company was making too much money and perhaps paying too large a return upon——

Mr. WRIGHT (interrupting): And then you would get a comparison, because you would find that another company in another place was doing the same thing and making less.

Mr. AITCHISON: When their whole schedule in effect is involved we have to see that they get a legitimate return on their investment.

Mr. WRIGHT: You probably have seen, the commission has probably seen, that I am trying to get into this case the difference between purely suburban business and this business that goes through. Bear that in mind. We wish to separate that.

Mr. MALARKEY: The question is as to the scope of this inquiry.

Mr. WRIGHT: I have stated it both ways and the commission knows what is meant therein.

Mr. AITCHISON: The complaint is not verified.

166 Mr. MALARKEY: If he did not swear to it—I do not blame him for not swearing to it. It has been well said by commissioner Aitchison that the question of the reasonableness of any rate to any particular point it may involve the consideration of the entire earnings of the whole system and the entire expenditures of the whole system. It might mean something that will take the commission a great deal of time to render a decision upon. Now, in view of the fact that Mr. Paget here, who is the representative of the association that makes this complaint, says to you in so many words that the complaint of these people is based upon the charge of discrimination——

Mr. WRIGHT (interrupting): That is not what he said.

Mr. MALARKEY: I am frank to say that we are not prepared to go into the other questions involved at this time. I did not think that there was any question about it. The thing came out of the witness incidentally. Is this commission going to rule at this time that this inquiry is going into the reasonableness per se of this rate?

Mr. AITCHISON: I do not understand that there is any question asked to involve a ruling on that yet. Go ahead, Mr. Wright. I beg your pardon, Mr. Malarkey you asked a question along the line of five cent fares to Oregon City or somewhere.

Mr. MALARKEY: I was asking if witness did not think that if a five cent fare was granted to Oak Grove, which is 8.48 miles from Portland, that it would be unjustly discriminatory against Concord, 9.26 miles from Portland, to charge 20¢?

Mr. PAGET: The conditions are altogether different.

Q. The conditions between Oak Grove and Lents are also different, are they not?

A. Defendant's charge makes such conditions. I do know that people who live at Oak Grove have suburban residences *of* Portland. As a matter of fact I do not know——

Mr. MALARKEY (interrupting): Do you not know as a matter of fact that there are suburban residents of Portland who live farther south than Concord?

167 A. I do not know that.

Q. Is there anything to prevent people from moving to Concord the same as you moved to Center a year ago?

A. No sir; I do not know of anything to prevent them.

Q. The gist of the complaint of you people out there is because a certain ride for one certain rate is obtainable and that you people ought to have the same rate——

Mr. PAGET (interrupting): The gist of our complaint, Mr. Malarkey, is that a five cent fare has been granted by your company to points similarly situated as to distance and as to natural conditions—soil, scenery, river and the bed of the road—and one thing and another. These places have been making such wonderful advances more or less and have undoubtedly made them on account of five cent fare. Our natural advantages are of no use to us.

Q. Your theory of your complaint is that if we carry a person from Portland to Lents, a distance of eight miles, for five cents we should carry a person from Portland to Oak Grove, a distance of eight miles, for five cents.

A. I took it for granted that the legislature which created——

Mr. MALARKEY (interrupting): I did not ask you for any legal opinions.

Mr. PAGET: You helped to make that law——

Mr. MALARKEY: If the witness will answer my questions we will get into this. I will ask you again so that we will get it down in the records: Your complaint is that because the Portland Railway Light and Power Company carries people from Portland to Lents, a distance of eight miles, for five cents over its Mount Scott division it should carry people from Portland to Oak Grove, a distance of eight miles, over its Oregon City division for five cents. Is that the theory of your complaint?

A. Yes sir.

Q. Do you want this commission to understand that you people out at Oak Grove Center, Risley and Courtney claim that if you had a five cent fare out there each of these points you mention would get to be as large and prosperous as Lents and St. Johns?

168 A. Yes sir, and larger. I do not know about St. Johns—Lents is the basis of our comparison and not St. Johns.

Q. You have testified to riding from Oak Grove to St. Johns; we will say for instance, you have ridden from Oak Grove to St. Johns——

Mr. PAGET: No sir, I said I had ridden to a point on the St. Johns line.

Q. When you made that ride you paid 15¢ to ride from Oak Grove to the terminus of the line at First & Alder streets?

A. Yes sir.
Q. Did you get a transfer?
A. No sir.
Q. When you got to First & Alder streets, what did you do?
A. I walked to the corner where the starting point was at that time.
Q. Do you remember where the starting point was at that time?
A. The starting point at that time was at Third & Alder streets.
Q. And there you got on another car and paid another fare, did you?
A. Yes sir, just the same as from Lents transfer to and from some points.
Q. Now this place called Golf Junction is on the city boundary, is it not?
A. I do not know.
Q. You do not undertake to say that it is not, do you?
A. I do not know. I do know that it is somewhere near the line.
Q. Did it ever occur to you?
A. No sir, I never had it pointed out.
Q. I do not mean that you knew the particular spot.
A. I know that it is near there. If it is outside I know, of course, the line comes back into the city again on the Springwater division.
Q. Yes sir. You know that if it is outside that the line going out on the Springwater division swings to the north so that it would be inside the city limits for some little distance, do you?
A. Yes sir.
Q. You know also, do you not, that this company publishes a regular tariff or schedule of its rates?
A. I know that it keeps them on file in the office.

Q. I will ask you to look at the one in record here and say
169 whether or not you have ever seen it? (O. R. C. No. 1.)
A. Yes sir, I have seen that tariff.

Q. Now turn to page No. 7, Mr. Paget, of this book: You will notice there under heading "One Way and Round Trip Rates—Oregon City Division" referring to the fares therein stated: I will ask you if you do not know from your experience and observation that these are the fares the company charge for rides on its line between those points?
A. Yes sir.
Q. The fact is, Mr. Paget, that you can get on a car at Oak Grove or Center, or Courtney, of Milwaukee Heights, and ride to Golf Junction for 10¢; is that not a fact?
A. Yes sir.
Q. Then you can ride to any point within the city from Golf Junction for five cents on a transfer.
A. That is a fact. It is not a competent fact—it is a hidden fact.
Q. Who hides that fact?
A. The conductors on the car line hide it.
Q. How do the conductors on the car line hide that fact?
A. Unless you happen to have advice from some source that is not competent you would pay your fare through to Portland and when you desire to get a transfer the conductor will not issue one.

The only way you can get a transfer is by paying fare to Golf Junction and then paying fare from there on in when a transfer will be issued.

Q. How did you find out that could be done?

A. Somebody told me—I believe it was my wife told me some passenger had informed her to that effect.

Q. You know it, and knew before, that the ordinances of the city of Portland and the laws of the state of Oregon require street cars to carry passengers to and from points within the city limits of the city of Portland for five cents, did you not?

A. I never knew how a transfer could be obtained, or that
170 one could be obtained until informed by some one as to how to get it.

Q. If you did not know from your observation and experience that passengers getting on any of the cars of the Portland Railway Company or the Portland Railway Light & Power Company within the city of Portland and paying a five cent fare were given transfers to transfer points from the car upon which they started to other points—did you not know that they were?

A. To travel how far?

Q. Inside the city limits?

A. No sir. I know otherwise by experience.

Q. Do you say that you could not get a transfer? Where, for instance?

A. That is, provided what you stated is correct, that Golf Links is the city boundary. Let me explain to you (and this is from experience) if you travel on the O. W. P. car on Hawthorne Ave. and take a transfer on the Oregon City division the Oaks is the point to which a transfer will carry you. If you take a transfer on the Washington Street car you can travel to the Golf Links. If you take a transfer on the Washington St. division to the Springwater division the terminus of transportation on the transfer is Nickum which point is somewhat outside of the city limits.

Q. Can you transfer from a Hawthorne Ave. car to a Sellwood car that will take you to the Golf Links? Do you not know as a matter of fact that you could?

A. I did not say anything about that.

Q. You can do that though, can you not?

A. Yes sir, but that implies an additional transfer and additional time. It is not a direct transfer.

Q. How is that?

A. Because when you are travelling from Hawthorne Ave. you would have to transfer twice instead of once. You cannot transfer clear through without paying 15¢ in addition to your transfer.

Q. I asked you if you can get a transfer from Hawthorne Ave. car to Golf Links over the Sellwood line?

A. Yes sir. You asked me if I did not know as a matter of fact that I could.

171 Q. I will put it this way: Before you discovered Mr. Paget, this way of getting from your home for five cents less in getting a transfer, did you not know before that that you could board a car at Golf Links and ride to the terminus——

A. I know that I could not transfer from certain points.

Q. You say that you only discovered recently that you could get the benefit of a transfer; you said that, did you not?

A. I said I discovered it, but I did not say recently.

Q. Well you have only lived there a year, have you not?

A. Yes sir.

Q. Before you discovered that way did you not know that a passenger could get on a car at Golf Links originating there—simply originating there—like these gentlemen going out to play golf, and for five cents ride on that car to Portland and get a transfer to other divisions?

A. I think so. I do not think I have ever tested it. I may have known it in a general way.

Q. Did you ever play golf out there?

A. No sir, I never played golf out there or anywhere else in my life.

Q. You know some of those people do play golf. Now, what I am getting at is this, Mr. Paget: You talk about kinks—I do not like these sarcastic expressions—you said something about kinks that had to be gone through with. Did you not know and realize that you could, at any time you wanted to, pay ten cents to ride from Center to Golf Junction?

A. No sir.

Q. Did you not know that was the fare from Center to Golf Junction?

A. No sir, I did not know that. I was never interested in that. I understand you to be talking about the time when I first moved out there.

Q. At the time you began to get interested on the subject of fare did you not know that you could ride from Center, your home, to Golf Junction for 10¢?

A. I think I had the right to think that when I was paying my fare that they were not trying to get some thing more out of me.

172 I think I had the right to think that.

Q. And we resent the idea that anyone was keeping you from getting the knowledge.

A. I am not making any insinuation that they were trying to keep the knowledge from me.

Q. But what I am trying to ascertain you knew that you could ride from Center to Golf Junction for ten cents, did you not?

A. No sir, I did not know it.

Q. When did you first ascertain that you could?

A. When I was first informed that I could get some benefit by paying fare that way.

Q. Who informed you to that effect?

A. I think my wife did—I know she did.

Q. Where did she learn it?

A. She learned that from some casual acquaintance.

Q. Did Mr. Fuller ever try to hide the matter from you?

A. No sir; neither did they try to enlighten me. When I pay my through fare in cases of these rides——

Q. Were you ever asked to pay anything more than the fare?
A. I was asked to pay my fare and I supposed I was paying the minimum fare and I had a right to think so. I had a right to think I was paying the minimum fare to various termini and various lines in Portland.
Q. How about that terminal from First & Alder streets, what is it?
A. I do not think there is anything about that in our case as I recollect it.

Mr. AITCHISON: There is no use developing what the fare is. The tariffs show what they are.

Mr. MALARKEY: You say you have been at Nickum——
A. I said I had been through Nickum.
Q. Did you ever stop there?
A. No sir.
Q. I will ask you if it is not a fact that Nickum is the first station on the Springwater division after leaving Golf Junction—is it not the first place the cars stop?
A. I think it is.
173 Q. You do not claim that Nickum has been thriving and building up on account of having a five cent fare, do you, ahead of Oak Grove?
A. I think I have shown conclusively why it has not.

Mr. AITCHISON: How about Berkeley, the new tract which the Jacobs-Stein people put on the market, do they have a five or ten cent fare? It is at a point between Nickum and Kerrigan.
Mr. MALARKEY: They have a ten cent fare, Mr. Aitchison, beyond Kerrigan.

Mr. AITCHISON: Do you know anything as to the development of that country, particularly around Berkeley?
Mr. PAGET: No sir, I do not. I know in a general way there has been some development up through that section. It does not seem to be a suburban section in the way ours is.
Mr. WRIGHT: I want to ask you, Mr. Paget, if you have ever seen in display at the depot at Courtney, Oak Grove, Center or on the cars any circulars or little cards of any kind stating on any of these documents, posted or otherwise, that you could ride in the way you have been questioned about by paying fare to Golf Links and then paying another fare?
A. No sir.

Mr. MALARKEY: (It is only by deceiving the company that you can do it.)

Mr. WRIGHT: Have you ever received any cords or information in that manner?
A. No sir.
Q. Has there ever been any such distributed?
A. No sir.

R. W. CRANE, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Where do you live, Mr. Crane?
A. I live at Courtney.
Q. How long have you lived there?
A. Two years and a half.
Q. What is your business?
174 A. For the last three or four months I have been in the real estate business.
Q. Have you handled real estate more or less since you have lived in Courtney?
A. Well, I have been doing some business. I have not sold very much but have considerable listed.
Q. Have you real estate listed immediately in and about Oak Grove, Center and Courtney?
A. Yes sir.
Q. Have you made any effort to sell it?
A. Yes sir.
Q. Have you been able to sell it readily?
A. No sir.
Q. State why you have not been able to sell it readily.
A. The greatest complaint seems to be that the car fare is too high.
Q. State whether or not people were satisfied with the quality of the land, or price, or other matters.
A. A good many think it suited them first rate; they like the location, soil and so on; that it would be a nice place to live but could not think of it on account of the car fare being so high.
Q. Did you inform these people what the car fare was when you asked them to buy? (Wright's letter 11-27-07.)
A. Some of them I did. I do not make it a business to tell them how high the car fare is until they make complaint to me about it.
Q. Did they raise the matter of car fare to you before you spoke of it?
A. They certainly did.
Q. What property did you have to sell—lots and acreage?
A. I had lots and acreage both.

(No cross examination.)

JOHN F. RISLEY, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Mr. Risley, where do you live?
A. I live at the first station the other side of Oak Grove—my property joins on Oak Grove property.
175 Mr. AITCHISON: Do you mean at Center?
A. I should say the first station past Center.
Mr. WRIGHT: How long have you lived there?

A. Forty-five years.

Q. Have you any property now immediately about either Oak Grove, Center or Courtney?

A. Not immediately about. I have some adjoining Oak Grove on the south.

Q. Is it property which is occupied by a residence? Is it near enough for them to take a car at Oak Grove?

A. Yes sir, they could. It would perhaps be not quite half a mile from the center of the station. You see, Oak Grove covers quite a large territory.

Mr. MALARKEY: I think counsel refers to the station, do you not?

Mr. WRIGHT: I speak of the station.

Mr. MALARKEY: Your station is Risley, is it not?

A. Yes sir, south of Center.

Mr. WRIGHT: Have you tried to sell any property which is immediately in and about the three stations I have mentioned?

A. I have.

Q. Have you met with any difficulty in effecting sales?

A. I have.

Q. What was the trouble?

A. Well, the parties would look over the land and then incidentally want to know about the car fare and I would tell them it is 15¢ and they would say "We will go back to Portland and will not buy the land." That is the reply nearly all of them made. I have not effected any sales.

Q. Did the parties know the fare when they came out to see the land?

A. I do not know whether they knew when they came out or not. Some of them came out with real estate men and I suppose they paid the fare.

Mr. AITCHISON: You have commutation books at Oak Grove and these other places, have you not, Mr. Fuller?

A. Yes sir.

Mr. A.: What are the fares to those places as they figure from these books?

A. I think 8½¢ to Center and 10¢ to Risley.

176 Mr. MALARKEY: Anybody can ride on the tickets.

Mr. RISLEY: They have printed on the books "Not good if detached."

Mr. MALARKEY: You can hand the book to anybody.

Mr. PAGET: You can not give the book to a friend or you would have none yourself.

Mr. WRIGHT: Have you noticed any increase in the travel during the last six months?

A. There has been a slight increase—not a very great increase.

Q. As far as Oak Grove, Center or Courtney?

A. There has been a slight increase, perhaps 25%.

Q. What do you think the travel was originally that went in from those places as to number of passengers?

A. I cannot say, Mr. Wright.

Q. Do you know how many go in each day now?
A. No, I do not; I have not kept tab on the proposition at all.
Q. Well, is it a large or small travel?
A. It is comparatively small travel I should judge—what I would consider small anyway.
Q. Have you ever been out to Lents?
A. I have.
Q. Have you ever been out to St. Johns?
A. I have.
Q. Compared to the travel from those places to and from Portland what is the extent of the travel from Oak Grove, Center or Courtney to Portland?
A. Well, it is not much more than one-third——
Q. I am not asking you for figures. Is the travel larger or smaller?
A. It is smaller.

Cross-examined by Mr. MALARKEY:

Q. Your station is Risley, is it not?
A. Yes sir.
Q. That is the station beyond Center, is it not?
A. Yes sir.
Q. You have some land adjacent to Risley, have you not?
A. Yes sir.
Q. And you would like to sell that land to people who come out there——
A. Yes sir.
Q. And you think you could sell more of that land if you had a ten cent fare, do you not?
A. Yes sir.
177 Q. And you think you could sell more if you had a five cent fare, do you not?
A. Yes sir.
Q. Do you not think you could sell more of it if you had no fare at all?
A. If there were no fare at all there would be no transportation.
Q. Do you not think if they were carried for nothing there would be more land sold?
A. Yes sir.
A. And do you not think the land around Risley is about as good as it is around Nickum?
A. It is better.
Q. The farther south you get the better the land is, is that true?
A. No sir.
Mr. AITCHISON: How does the land around Oak Grove compare with land around Lents?
A. It is much better.
Mr. A.: Why is the land around Oak Grove better than around Lents?
A. The land around Lents is gravelly.
Mr. A.: What difference is there between Lents and Oak Grove

besides the soil that would make Oak Grove more desirable as a place to live if transportation were equal?

A. In Oak Grove you can raise fruit trees and garden and such as that. Of course, Oak Grove lies on the Willamette River and that is quite a benefit too.

Mr. MALARKEY: Let me ask how many more witness- you have, Mr. Wright?

Mr. WRIGHT: Four more and they will not be very long. We may have to call Mrs. Clinton. You know about the character of the evidence, it will run about the same as Mr. Risley's.

(Adjourned until 2:00 o'clock p. m.)

Pursuant to adjournment commission met at 2:00 o'clock p. m. and proceeded with the hearing. Present same as in the morning.

M. G. MUNLEY, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

178 Examined by Mr. WRIGHTS

Q. Are you interested, or do you own property in the immediate vicinity of Milwaukee Heights, Center, Oak Grove or Courtney?

A. The lands we owned—I say "we", the land is owned by several—I have an interest in it with others.

Q. Where is this land of which you speak?

A. It is crossed by the Oregon City line at Milwaukee Heights. The station is on the place which we sold. The other land is situated so that it would face Center and Oak Grove, which is behind that, so that the land extends quite a distance and the tract contains 410 acres.

Q. Is there any part of it which if settled the passenger traffic would be tributary to Oak Grove or Center stations?

A. It would be tributary to Oak Grove, or rather Courtney.

Q. Judge, did you have anything to do with land subsidies given to the predecessor of this present company?

A. Yes sir, we gave land to the Oregon Railroad line. That was one of the conditions upon which they built the line.

Q. Were rights of way given to them also?

A. Yes sir; rights of way were donated by us at least and I think by the others also.

Q. Is the present right of way that is occupied by this company through Oak Grove, Courtney and Center?

A. I know that it is the present right of way over the tract which we own. It is the same right of way all the way through except a little strip this side.

Q. Besides the right of way, did the railroad company receive donations of land?

A. We donated twenty acres of our best land, worth at that time $225.00 per acre.

Q. Did you receive any consideration for that land?

A. Not except that they built the line, and they agreed to give us good service and cheap service.
Q. When was this?
A. In 1893 or 1894.

179 H. G. STARKWEATHER, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Where do you reside, Mr. Starkweather?
A. Near Risley station.
Q. Are you familiar with this railroad and the country in and about Oak Grove, Courtney or Center stations?
A. I am.
Q. How long have you lived where you say you are living?
A. About thirty-five years.
Q. Have you been over that country to any considerable extent?
A. I have been over it very thoroughly.
Q. What occupation have you followed heretofore?
A. I have followed a good many different occupations. At the present time I am farming and doing a little real estate business on the side. I have been associated with Mr. Risley for a little over five years.
Q. Have you not been superintendent of schools?
A. I was during the period from 1896 to 1898 superintendent of public schools.
Q. How long did you say you had been in the real estate business?
A. In the neighborhood of five years.
Q. Do you refer to the past five years?
A. Yes sir.
Q. Have you made efforts to sell property in and about these stations I speak of?
A. I have.
Q. I refer to property immediately next to them; have you?
A. More particularly near the Risley station, but we have attempted to sell some near Courtney station also.
Q. Now, referring to land near those three stations of which I speak, have you had difficulty in tryin*t* to sell it?
A. We have not succeeded—which three stations do you mean?
Q. Oak Grove, Courtney and Center.
180 A. We have not sold any near those three stations.
Q. Have you tried to do so?
A. Yes sir.
Q. What was the trouble?
A. One trouble, at least, was the fare charged.
Q. State what it was—you say it was the fare, state the details.
A. Fares are higher than to many other points at equal distances from Portland.
Q. Was that objection urged to you by prospective buyers?

A. It was mentioned.

Q. Was it mentioned as a reason why they would not buy?

A. Yes sir.

Q. Were you living there at the time the road was originally built over its present right of way?

A. I was.

Q. At the time the road was built through those three station-?

A. Yes sir.

Q. Do you know whether subsidies were given by persons who owned land adjoining those three stations I asked about?

A. Do you mean the lands immediately adjoining those three stations?

Q. I refer to land adjoining the right of way that passes by those three stations of which I speak.

A. I know of subsidies having been given by individuals owning land in the vicinity.

Q. Who were those individuals?

A. I know, for one, Mr. J. S. Risley gave between 17 and 18 acres outside of the right of way. He gave right of way free also and this subsidy in adition, making about 20 acres in all.

Q. Did Mr. Breyman give any subsidies or right of way through there?

A. Mr. Breyman?

Q. Yes, sir, Mr. Breyman?

A. I do not know that party.

WITNESS: There was a Mr. Knapp farther south who gave a subsidy in addition to right of way.

Cross-examined by Mr. MALARKEY:

181 Q. Where do you live, Mr. Starkweather?

A. About a mile from Risley station, southeast.

Q. In coming to and from the Oregon City div. of the Portland Railway Light & Power Company do you ride on the cars?

A. Yes sir.

Q. You lived there before the electric line was built, did you not?

A. Yes sir.

Q. Before the electric line was built what means of transportation was employed to go to Portland from that section of the country?

A. We frequently drove with a wagon, and sometimes we drove to the river and came in a boat.

Q. Would you go back and forth on the trains of the Southern Pacific Company?

A. Very seldom; we did occasionally.

Q. What station of the Southern Pacific Company served you?

A. Milwaukee station.

Q. Was that the nearest station?

A. I doubt if it was the nearest, but it was the nearest by the road we usually traveled.

Q. How far would you have to go from Risley to Milwaukee to

get a Southern Pacific car—to the place you would have to go to get a train to go to town?

A. From where I live it would be about three miles.

Q. You would have to walk three miles if you wanted to go by boat or go by private conveyance, would you?

A. Yes sir.

Q. What is the nearest station on the Southern Pacific to Risley now?

A. The nearest station is probably Clackamas; in a direct line it would be a little nearer than Milwaukee.

Q. What is the fare from Clackamas on the Southern Pacific Company's line?

A. I do not know.

Q. What is the fare from Milwaukee to Portland on the Southern Pacific?

A. I do not know.

Q. What is the fare by boat from Risley to Portland?

A. I think the fare is 25¢ but I am not sure.

182 Q. The boats of the Oregon City Transportation Company are the boats that stop there, are they not?

A. Any of them stop there.

Re-examined by Mr. WRIGHT:

Q. Mr. Starkweather, is there any road—convenient road—leading to this Clackamas station you have spoken about from Oak Grove, Center and Courtney?

A. Not very direct.

Q. How far is it around by the most convenient road?

A. I am inclined to think it would be considerably over three miles.

Mr. MALARKEY: Do you want us to build the road?

Mr. WRIGHT: You brought this out.

Mr. WRIGHT: Is that the only road there at present to get over to Clackamas—this road that is three miles around?

A. That is the most usual way of getting there.

Q. Is that road the most direct one from there to Clackamas?

A. Yes sir.

Q. Does the Southern Pacific Company run a service between Portland and this Clackamas station every thirty-five minutes?

A. No sir.

Q. Has the Southern Pacific ever done so?

A. No, not regularly.

Q. What do you mean by "not regularly"?

A. I think not at all, not to my knowledge.

Q. Do they offer to transport passengers daily on such services as that?

A. Not that I know of.

Q. Have they made any effort that you know of to get passenger traffic from Oak Grove, Courtney and Center stations?

A. I do not know of any such effort.

Q. Have the boats on the river made any effort to get that passenger traffic?

A. I think, years ago, they did make some effort.
Q. Have they made any effort to keep that traffic, or to get it, since the defendant railway has built through there at those stations?
A. I could hardly testify as to that; I do not know of any effort made recently.
183 Q. Have you seen any solicitors around to get passengers to travel by these boats to Portland?
A. No sir.
Q. Do they land there every thirty-five minutes?
A. No sir.
Q. If you wanted to travel by a boat is there any station down there to take the boat from?
A. Do you mean a building?
Q. Yes sir, I mean a building.
A. No sir, there is not.
Q. Is there any method of taking that boat except by going down and hailing it?
A. Not that I know of.

(Excused.)

JULIUS BROETJE, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Where do you live, Mr. Broetje?
A. Courtney station.
Q. How long have you lived at Courtney station?
A. About ten years.
Q. What is your business?
A. Florist and nurseryman.
Q. Have you been in that business at all times?
A. Yes sir.
Q. What do you sell?
A. Mostly ornamental shrubberies.
Q. Do you sell roses mostly?
A. Roses, cut flowers and so on.
Q. Do you have trade in Portland?
A. Yes sir.
Q. Do they come to your nursery to buy stock?
A. Yes sir, quite often.
Q. Have you had any complaint from your customers in regard to the difficulties of trading with you out there, and if so, state what they are?
A. Yes sir; they say they would purchase more but that 15¢ car fare is rather high.

(Excused.)

184 HENRY HEITKEMPER, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Where do you live, Mr. Heitkemper?
A. I live at Oak Grove near Courtney station.
Q. Do you live between the two stations of Oak Grove and Courtney?
A. Yes sir.
Q. How long have you lived there?
A. Eleven years.
Q. Do you own any property there?
A. Yes sir.
Q. What do you own there?
A. I own pretty nearly eight acres there?
Q. How long have you owned that property?
A. I owned one piece—four acres, eleven years, and the other piece—about five or six years. I do not remember exactly.
Q. During the time you have been there state if you know the increase in the number of houses that are built or have been built in and about Oak Grove, Center and Courtney—has it been large or small?
A. I think it was not very large. I could not exactly remember, there might be about twenty houses built since then, all told—shacks and all.
Q. Do you know anything about the increase in population in and near those stations—whether that has been large or little?
A. Not so very much. It is about the same thing around Courtney station except one or two or three houses more than when I first came there.
Q. Have you tried to sell any land in and about those stations?
A. No, not exactly, but the people came to me. You see, I was there first and the people came to me and asked me about pieces of land, and real estate men came there and stopped off at my place and wanted to show people how things were growing so as to encourage them like that. I was never in the real estate business myself.
Q. Is the land easy to sell or slow?
A. It is slow selling.
185 Q. Do you know any reason why that is true?
A. They kick on the fare, especially strangers, you know. They did not know the fare and when they find out they say it is too high and they would rather be where they would have a little cheaper fare. That is all I heard about it. You see, they first charged 25¢ for a round trip and after a while they raised to 15¢ straight. You see they had different arangements about the fare, you know. When I first came there it was 8¢ to Oak Grove. That meant Oak Grove the way Oak Grove was platted and there was no Center and no Courtney—just Oak Grove or wherever they had a station—little platform where people got off. After awhile they

put up a sign half way and called that Oak Grove and charged 8¢ to there and more from there on.

Mr. AITCHISON: That was on commutation tickets, was it not?

A. Yes, sir. Then when the first company sold out they charged 8¢ and when they had some kind of trouble they charged by commutation ticket 10¢. Of course we paid it. After awhile (I do not know what happened) it came down to 8¢.

Mr. WRIGHT: Do you know whether right of way past Courtney, Oak Grove and Center stations was given to the road?

A. As far as I know there was given to the road forty acres.

Q. Do you know who gave that forty acres?

A. The Oak Grove Company—they gave it for right of way.

Q. Who were the principal men?

A. Breyman, Merritt and Hyler. Merritt was the secretary and Breyman was the president.

Q. Do you know whether they gave the railroad any subsidy outside of the right of way?

A. I could not tell exactly as to that. I do not know.

Cross-examined by Mr. MALARKEY:

Q. Your station is Oak Grove, is it not?

A. No, sir, it is Courtney, that is the nearest. They stop right in front of my place and this other company they said they stopped there for nine years. What they called (Witness interrupted by Mr. Wright whispering to him).

186 Mr. MALARKEY: I object to counsel talking to witness while he is being cross examined.

WITNESS: That was Courtney station, and then came my station, which was Elkhorn station. Then after awhile they took my station off and put it up where they call Oak Grove.

Mr. AITCHISON: The present commutation rate to Oak Grove is 8¢, is it not?

A. Yes, sir. (Mr. Malarkey.)

Mr. MALARKEY: The rate has never been any less than that since the station has been there, has it?

A. No, sir.

(Excused.)

THOMAS HOWELL, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified, as follows:

Examined by Mr. WRIGHT:

Q. Where do you live, Mr. Howell?

A. I live at Center station, in Oak Grove.

Q. How far away from it do you live?

A. From the station?

Q. Yes, sir.

A. About 300 feet.

Q. How long have you lived in that neighborhood?

A. I cannot say exactly, but nearly five years.

Q. How long have you lived in the vicinity of Oak Grove, Center and Courtney?

A. Four years.

Q. Did you understand me—I am asking how long you have lived in the vicinity of Oak Grove, Center and Courtney—anywhere near those stations?

A. Why, five years.

Q. Where did you live before that?

A. I lived at Oregon City and Willamette Falls,—rapids.

Q. I thought you lived there longer. Do you own any property in the vicinity of those three stations?

A. I do.

187 Q. What property do you own near there?

A. I own a small lot on Center Ave.

Q. Is that near Center station?

A. 130 feet from it.

Q. What business have you been in?

A. Merchandise mostly.

Q. Where is your business?

A. Oak Grove.

Q. When did you have a store there?

A. Most of the time—I was out of business a year. I have a store now.

Q. State when you first went into business there?

A. I think it was four years ago—about four years ago.

Q. Were you postmaster there at any time?

A. Yes, sir.

Q. At what time was that?

A. The post office was established in 1903, January, 1903. I am not sure about the date.

Q. Were you then running a store there?

A. Yes, sir.

Q. Did you have occasion to count up the population about that time?

A. Yes, sir.

Q. Did you do so?

A. Yes, sir.

Q. Do you know about what the population was then for what territory you counted it?

A. The territory was from Milwaukee Heights to Risley station and I estimated the population at 300.

Q. What occasioned your counting it up at that time?

A. I counted it on account of getting the post office established.

Q. Yes, sir, but what were you doing in order to get it established?

A. I had to get up a petition and have it signed by those who would be served and the government required me to make a close estimate of the number of inhabitants within the delivery of the office.

Q. Now, do you wish to be understood that this territory is along the line of the railroad between Milwaukee Heights and Risley stations?

A. Yes, sir.

Q. How far on either side of the railroad do you include?

188 A. From the County road on the east to the river on the west.

Mr. AITCHISON: How far is that county road?

A. One half mile east.

Mr. A.: How far is it to the river?

A. About half a mile.

Mr. A.: Do those people all use this car line in that district?

A. Yes, sir, More or less.

Mr. WRIGHT: Is there any travel by people in that district regularly to Oregon City by the boats?

A. No, sir.

Q. How many houses do you think there were, if you know, at this time you became postmaster and circulated that petition?

A. I do not know as to taking in the whole of that territory from Milwaukee Heights, but from Courtney—the south line of Courtney—to the Risley line on the south there was 20 houses at that time, when I moved there.

Q. How many stores were there in and about those three stations I mentioned?

A. There were two that you might call stores.

Q. Did those two stores have large or small stocks?

A. Very small stocks.

Q. Have you been over that same territory frequently during the last year?

A. Yes, sir.

Q. Have you noted the increase in population and increase in the number of houses, if any?

A. Yes, sir.

Q. What do you estimate the present population to be in that same district that you speak of?

A. Do you mean of the smaller district, or——

Q. The district where you said you made the population 300?

A. There are now probably about 60000 something close to that.

Mr. AITCHISON: It has doubled in what length of time—six years?

A. It has doubled in five years.

Mr. WRIGHT: Has there been any ready or constant sale of property in that district during the last five years?

A. Yes, sir; there have been sales.

Q. Has there been a ready sale—easy sale?

A. Well, not very easy. I have tried to sell some myself and did not succeed.

189 Q. Have the sales been very frequent in that district?

A. No, sir; not very frequent.

Q. Do old residents go away from there?

A. Yes, sir.

Q. Do you know the reason why they leave?
A. Several of them have told me their reason for leaving was poor service.
Q. State the reason, if you know.

Mr. MALARKEY: I object to that as hearsay evidence.
Mr. AITCHISON: Objection is overruled.

WITNESS: The reason they told me was poor service and high fares on the cars.
Q. Have you been trying lately to sell real estate?
A. Yes, sir.
Q. Have you been successful?
A. I have not.
Q. What was the reason for your being unsuccessful in selling real estate?
A. The reason they will not buy is because of excessive fares as they would understand it.
Q. Did you explain about these commutation tickets to them?
A. Yes, sir.
Q. Were they not satisfied when you explained that?
A. No, sir.
Q. Did they ever ask you about transfers?
A. No, sir.
Q. Do friends of people residing there go out with great frequency to visit them?
A. No, sir.

Mr. MALARKEY: That is an advantage.
Mr. WRIGHT: It might be.

Q. What was their reason for not doing so, Mr. Howell?
A. As to their real reasons I could not say. They would hardly complain to me of the fare being too high.
Q. Were prospective buyers you offered real estate to satisfied with the location and the price of the land offered?
A. Usually, yes, sir.

Cross-examined by Mr. MALARKEY:

Q. Did you say they were satisfied with the price of the land?
A. Usually.
Q. Why did they not buy it then?
A. On account of the car service and fares.
190 Q. Then they were not satisfied with the price of the land in view of the car service and fares—you mean they were satisfied with the price of land if the fares were cheaper, do you not?
A. Yes, sir.
Mr. MALARKEY: In other words, if there were a five cent fare the price of the land would have been satisfactory? Is that the case?
A. Yes, sir.
Mr. AITCHISON: Were these people who were talking about buy-

ing intending to buy for speculation or were they figuring on buying for homes?

A. For homes.

Mr. A.: What size tracts were they figuring on buying?

A. Any size up to five acres—usually wanted one.

Mr. MALARKEY: Who were they—do you know the names of these persons?

A. No, sir, they were strangers.

Mr. M.: Can you give this commission the name of any person who was figuring on buying land from you?

A. I do not think I can just now. They were usually strangers to me.

Mr. M.: How did they get out there—on the cars?

A. Yes, sir.

Mr. M.: They knew the fare when they went out, did they not?

A. Yes, sir, I expect they did.

Mr. M.: How long has it been since you tried to sell any land to anybody?

A. I try to sell land every day—to anyone who comes along.

Mr. M.: How long has it been since anyone came along—do people come along every day?

A. Yes, sir, but very few sales.

Mr. M.: Perhaps you asked too much for the land?

A. I never heard them complain in regard to the price of property.

Mr. AITCHISON: What price do you ask for one acre of good land?

A. For the best land there we ask from $500.00 to $600.00 per acre.

Mr. WRIGHT: Mr. Howell, is a good deal of that land cut up now into town lots?

A. Yes, sir.

Q. Are those lots of the usual size—50 feet by 100 feet?

A. Over half of them are 50′x100′.

191 Q. What is the size of the others?

A. 50′x130′ to 145′.

Q. Fifty feet is the width, average width of the lots, is it?

A. Yes, sir that is the average width.

Q. State whether or not it is possible to sell these fifty foot lots out there very readily.

A. I have never succeeded in doing so.

Mr. CAMPBELL: What are lots selling at out there?

A. From $150 to $500 according to the location.

Mr. WRIGHT: I do not think he understood the question.

WITNESS: I answered.

Mr. CAMPBELL: Can a man pay $500 to $600 per acre for that land out there and make a living on it?

A. Hardly.

Mr. C.: Do you think it is not productive enough to make a living on it?

A. He might, yes sir.

Mr. WRIGHT: Would he be able to make any improvements on his land but his labor?

A. I think not to any extent.

Mr. W.: Would he on one of these $150.00 lots you speak of—could he make a living on it?

A. I think not.

Mr. MALARKEY: Why do you ask so much for the land if a man cannot make a living on it?

A. Why do they ask so much in the city?

Mr. M.: Is that what you are trying to do—get as much for land as they do in the city?

A. No, sir.

Mr. AITCHISON: When you go to gardening this land what can you raise well?

A. The land grows very nice crops—all kinds of fruits.

Mr. AITCHISON: But you cannot realize a profit of $200 or $300 per acre like onions or those very intensive crops, can you?

A. No, sir.

Mr. WRIGHT: How long does it take crops to mature up there——

Mr. MALARKEY: How do walnuts do up there?

192 A. I have not seen anyone try to raise them.

Mr. M.: They have chestnuts up there, haven't they?

A. Mr. Risley has lots of chestnuts.

(Excused.)

Mr. WRIGHT: Mr. Paget thinks he made some error in those mileage distances when you were asking about them.

Mr. PAGET: I did make a mistake when I was asked as to the distance from Milwaukee Heights to Lents, there was an error there in the figures.

Mr. MALARKEY: Immediately after that somebody said there was no controversy as to the records.

Mr. WRIGHT: I did not admit that. I said I believed they were exactly alike. I still think so.

Mr. AITCHISON: We had better take a recess of about four minutes and find out.

(Counsel and commission check up records and find they agree as to distances.)

Mr. WRIGHT: We will agree on whatever the schedule shows.

Mr. AITCHISON: Whatever the tariffs show?

Mr. WRIGHT: We will admit the tariff sheets.

Mr. AITCHISON: Let the records show as to the distances as set forth in tariff O. R. C. No. 1 of the defendant may be considered as proven.

Mr. WRIGHT: I believe that is all we have here. Mrs. Clinton we find is sick in bed so that it is impossible for us to segg*r*egate the immediate district around Lents.

Mr. MALARKEY: We stipulate that Mrs. Clinton would testify to that if she were here. (Refers to card held by Mr. Wright, which has not been described.)

Mr. AITCHISON: It is admitted that Mrs. H. M. Clinton of the

Pope Directory Company, if sworn, would testify to the effect that the names listed in the Portland City Directory for the district embracing from the Section line road, three sections south to the south line of Woodstock and on the line of said limits would be as follows:

1903, 130 names; 1904, 1358 names; 1905, 1794 names; 1906, 2656 names; 1907, 3608 names. That in estimating the
193 actual population in that district based on directory names she would multiply those numbers by three and one-half.

Mr. MALARKEY: Do you rest? I just want to ask a few questions to see what you will admit. Will you admit that under the franchises of the Portland Railway Light and Power Company under which it operates its cars in the city of Portland is prohibited from charging more than 5¢. for any one continuous ride within the city?

Mr. WRIGHT: Entirely within the city? Do you say that the franchises so provide?

Mr. AITCHISON: Do you want to take Mr. Malarkey's word for it?

Mr. MALARKEY: I thought everybody knew that the franchises of the Portland Railway Light and Power Company under which it operates so provide.

Mr. WRIGHT: I understand that only applies to lines within the city.

Mr. AITCHISON: Could you quote those franchises?

Mr. MALARKEY: I can quote it substantially—that they shall not charge more than five cents for one continuous ride over its line within the city. Will you not admit that the franchises so provide?

Mr. WRIGHT: I will stipulate that if you so introduced the franchises of the defendant they would so show.

Mr. WRIGHT: I wish to object to the testimony as immaterial, incompetent and irrelevant and not within the jurisdiction of the commission.

Mr. SEABROOK: That is what we claim and were about to say. We agree on that.

Mr. WRIGHT: When you are dealing with fares outside of the city you are within the jurisdiction of the commission. There is one thing, I do not want to have it understood that I waive my objections.

Mr. MALARKEY: You will admit, as I understand it, that the company sells commutation books, each containing twenty coupons, and each of which entitles the bearer to ride to and from the following stations at the following rates: $1.60 for Milwaukee Heights, $1.60 for Oak Grove, $1.70 for Center and $2.00 for Risley. You admit that, do you not?

Mr. WRIGHT: Why, yes sir, whatever the tariffs show. We cannot dispute their tariffs on file.

194 Mr. MALARKEY: Mr. Paget spends $20.00 a month on those commutation tickets and he knows. He can tell you. I suppose you also admit that Golf Junction on the southern boundary of Portland is the junction to the Springwater division, do you not?

Mr. WRIGHT: In the matter of these schedules, I presume you are to be understood that fares charged from Oak Grove, to-wit, 15¢, includes passage to 1st & Alder sts.?

Mr. MALARKEY: To make that clear Golf Junction is included as a station.

Mr. MALARKEY: I do not know whether or not, after having that contract identified by Mr. Brodie, I introduced it in evidence. I do not know whether I did or not. I will now offer in evidence the contract between the Portland, Chicago and Mount Scott Railway Company and the Portland and Oregon City Railway, being the contract which was identified and referred to by witness G. A. Brodie when called upon the stand and marked Exhibit 1.

Mr. WRIGHT: And to which plaintiff objects as being immaterial and irrelevant.

Mr. WRIGHT: I understand the commission will reserve its ruling?

Mr. AITCHISON: It will on those.

Mr. WRIGHT: We wish to note objections as we go along.

Mr. MALARKEY: Is the contract not received?

Mr. AITCHISON: It is received subject to the objection.

Mr. MALARKEY: I understood all these rulings were made——

Mr. AITCHISON: When they seem to embody the crucial of the entire question we will reserve the ruling.

Mr. MALARKEY: Now, we will ask for adjournment until to-morrow morning.

Mr. WRIGHT: Mr. Paget says he must go up to the bank.

Mr. MALARKEY: In the matter of arguments, if I may ask the commission, would it not be better to have both cases argued together. Though not entirely the same the issues are very much the same.

Mr. AITCHISON: We would like to have it that way, and would like to know whether counsel would be able to furnish us with briefs in addition to the evidence?

195 Mr. WRIGHT: If the commission would like to have a brief I would like to furnish one.

Mr. MALARKEY: I think proper that briefs should be furnished.

Adjourned at 3:30 p. m. until 9:30 tomorrow morning.

Pursuant to adjournment commission met at 9:30 a. m. Present same as yesterday, except Mr. Paget, who is absent.

Mr. MALARKEY: I desire to have introduced testimony in behalf of the defendant and I now move this commission to dismiss this proceeding for the reason that there has been no evidence presented to this commission upon which it can predicate any finding that the rates of fare charged to the points of Oak Grove and Courtney, and the other points mentioned in the complaint as complained of herein are unreasonable or unjustly discriminatory, and that on the other hand it affirmatively appears from the evidence introduced by the complainant that the rates complained about to those points are reasonable and are not unjustly discriminatory.

Mr. AITCHISON: That will be considered on the final submission of the case.

Mr. MALARKEY: We will call Mr. Richmond.

Mr. WRIGHT: Mr. Paget cannot be here and he handed me a copy of the constitution and by-laws of the association. I want that introduced.

Mr. AITCHISON: I do not see that there is any point. Mr. Paget's interests appear in his testimony.

A. H. RICHMOND, a witness produced on behalf of the defendant, after being duly examined and sworn, testified as follows:

Examined by Mr. MALARKEY:

Q. What is your business, Mr. Richmond?

A. Civil engineer.

Q. What is your present occupation?

A. Engineer of the Portland Railway Light and Power Company.

Q. Have you held any official position in this city or county?

A. Yes sir—county surveyor here.

196 Q. For what length of time were you county surveyor of Multnomah County?

A. For two years.

Q. How long ago was that?

A. I think it was in 1905; it was before the present county surveyor.

Q. Were you the last county surveyor before the present county surveyor?

A. Before Mr. Holbrook.

Q. And Mr. Holbrook was elected in 1906, was he not?

A. I think in 1905.

Q. Are you familiar with the lines of the Portland Railway Light and Power Company and with those lines which are known as the Oregon City div., being the line that runs from Portland to Oregon City, and the Mount Scott div., being the line that runs from Portland via Mt. Tabor to Lents, and the Springwater div., being the line that runs to Cazadero?

A. Yes sir.

Q. Now, do you know where the station and point known as Golf Junction is located?

A. Yes sir.

Q. Is that point located at the junction where the Springwater and Oregon City line divert and the Oregon City line continues up along the east bank of the Willamette River and the Springwater div. goes east?

A. Yes sir, at the intersection of 13th St. & Ocoshoe Ave. (?)

Q. Where is that point and station known as Golf Junction with reference to the southern boundary of the city of Portland?

A. Right on the boundary. The southern boundary of the city is on Ockoshoe St.

Mr. AITCHISON: Which station are you discussing—there are two stations?

A. The junction is right on the boundary. There is a little wye that comes in there from the river side and the station is just on the north side of the track that goes out to Springwater. Right inside of the wye.

Mr. AITCHISON: Where is the station on the Oregon City line?

Mr. WRIGHT: Take a piece of paper and mark it out.

(Witness draws diagram.)

WITNESS: The city boundary runs to the south line of
197 Ocoshoe St. The city boundary is, I think, on the south line of the street.

Mr. AITCHISON: Where do the Oregon City cars stop?

A. They stop almost exactly on the line as nearly as I can determine. The little station is right here at the point marked "A" on the plat.

Mr. MALARKEY: Is the south line of Ocoshoe St. the southern boundary of Portland?

A. Yes sir.

Q. Is any part of the Oregon City division, the line of the Oregon City div. of the Portland Railway Light and Power Company between Golf Junction—the stopping place at Golf Junction—and First and Alder Sts. or any part of the said line between the said points outside of the city of Portland?

A. No sir, the line between the station and First & Alder Sts. is all within the city limits.

Q. And First & Alder Sts. is the Portland terminus of the line, is it not?

A. Yes sir, comes around the loop there at Alder St.—the Oregon City cars do.

Q. Do you know where the station of Nickum is on the Springwater div.?

A. Yes sir.

Q. I will ask you if there is any station or stopping place on the Springwater div. between Golf Junction and Nickum?

A. No sir.

Q. How far is it on the Springwater div. from Golf Junction to the point within the city boundary of the city of Portland where that line of the Springwater div. leaves the city?

A. It is 3037 feet.

Q. Is any part of the line of the Springwater div. between Golf Junction and the point where it crosses the boundary of the city of Portland 3037 feet from Golf Junction outside of the city of Portland?

A. No sir, it is not. It goes right down the center of Ocoshoe St. and branches off to the left. It is all inside the city limits.

Q. Referring, for instance, to this map marked "Defendant's exhibit 7" and this red line representing the Springwater div., and this blue pencil line representing the city boundary, and this black dot with the word "Nickum" in lead pencil right alongside the station of Nickum: What I want to know is whether or not any part of the Springwater div. from the time it leaves Golf Junc-
198 tion until it crosses the city boundary as marked on the map goes outside the city limits?

A. No sir.

Q. Now, Mr. Richmond, you have stated that the distance from Golf Junction to the place where the Springwater division crosses the line of the city boundary is 3037 feet. Now, how far is it along that same line from the place where the line so crosses the city boundary to Nickum?

A. It is 3060 feet—that would be from the city limits to Nickum.

Q. Then the city boundary is within a few feet of being half way between Golf Junction to Nickum? Is that true?

A. Yes sir.

Q. How far is it from Lents to Lents Junction on the Mount Scott div. of the defendant company?

A. It is 3385 feet.

Q. Do the cities of Portland and St. Johns adjoin?

A. Yes sir, the boundary line is identical, I think it is on Ida street.

Q. But it is the boundary line of Portland and St. Johns—north boundary of Portland and south boundary of St. Johns—the line is common and identical, is it not?

Q. The line between Portland and St. Johns would be almost north and south, you know.

Q. Because of the turn in the river down there, do you mean?

A. Yes sir.

Q. Well, at all events, the place where they come together the line is identical and common boundary line, is it not?

A. Yes sir.

Q. Does any part of the street car tracks, or line, of the Portland Railway Light and Power Company which is operated between Portland and St. Johns go outside of the corporate limits of Portland and St. Johns?

A. No sir, it is all within the limits of Portland and St. Johns. That is, it is either in St. Johns or Portland.

Q. There is no part of that line at any time that is neither within the corporate limits of Portland or St. Johns, is there?

A. No sir.

Q. How much of the Portland-St. Johns line is within the city of St. Johns as compared with the part that is within the city of Portland?

199 A. But a very small portion of it. I have the figures in the office but I could not give it to you off hand. It is but a small portion that is inside of St. Johns as compared with what is within the city of Portland.

Q. As an estimate, without exact figures, what proportion—what percentage of the whole line is within St. Johns?

A. I do not remember. I could not give a very clear estimate. I could with a map though.

Mr. MALARKEY: That is all for the present. You can look that up and I may call you later.

Cross-examined by Mr. WRIGHT:

Q. There is one thing: You speak of this Golf Junction—is that station on the property of the Golf Links people—I do not know what their association is called—is it built on their property?

A. I think not—I think it is built on the right of way.

Q. Is any part of it built in Ocoshoe St.

A. I think it is almost on the—I would not be exactly sure of the location of this station on Ocoshoe St. I think it is near the center line.

Q. Near the center line of what?

A. Ocoshoe st.

Q. If you are coming back here I would like to have you state.

A. I can locate it exactly on the street line, but I would not say exactly on the center line or exactly on the south line of the street.

Q. I should like to know whether that station or any part of it is clear in Ocoshoe St.

Mr. MALARKEY: Mr. Richmond will not be called back. I will say right now, as far as we are concerned, we are undertaking to show it is on the city boundary.

Mr. WRIGHT: If he does not know where that is let him so state.

Mr. MALARKEY: He stated as near as he is able. I would not have brought him on the stand to testify to that whole case.

Mr. WRIGHT: You do not know whether any part or the whole of that station is within the limits of Ocoshoe st. do you, Mr. Richmond?

200 A. I do not know the exact distances from the center of the street.

Q. Do you know whether any of the building is within Ocoshoe St.?

A. I think it is.

Q. You think a part of it is, is that what you mean?

A. I think the building is practically on the street.

Q. Practically on the street, did you say?

A. Yes sir.

Q. That is, it stands northward from the south line of Ocoshoe St., is that it?

A. I think it is; I am not positive.

Mr. MALARKEY: Do you know that as far as that station is concerned—do you know who built that station or who maintain it—whether built by—I mean the station house—whether built by the Golf Links people or the company?

A. No sir, I do not know.

(Excused.)

W. B. MULCHAY, a witness produced on behalf of the defendant, after being duly examined and sworn, testified as follows:

Examined by Mr. MALARKEY:

Q. What is your position, Mr. Mulchay?

A. Traffic agent of the Portland Railway Light and Power Company.

Q. Are you familiar with the passenger tariffs and fares charged by the Portland Railway Light and Power Company upon its Springwater and Mount Scott and Oregon City Divisions as set forth in the Portland Railway Light and Power Company's passenger tariff known as O. R. C. No. 1?

A. I am.

Q. Referring to the Springwater div. and the service which is maintained thereon as an interurban service between Portland and Cazadero and intermediate points: Do the cars on that line stop at other than regular stations or stopping points?

A. No sir.

Q. What is the first station or stopping point on that line beyond the actual boundary of the city of Portland?

A. Nickum.

201 Q. What is the last station or stopping point on that line as you go out towards Cazadero before you reach Nickum?

A. Golf Junction.

Q. Is there any station or stopping point on that line between Golf Junction and Nickum?

A. No sir.

Q. Is there any station or stopping point on that line at the place where the line actually crosses the city boundary and goes out of the city of Portland?

A. No sir.

Q. Do you know what the situation, condition and topography of the country is at that point where the line crosses the city boundary?

A. Yes, sir, I am pretty familiar with it.

Q. What is it?

A. Do you mean as to whether a station could be established?

Q. Yes sir.

A. Nickum is the only point where a station could be established after leaving the city boundary line.

Q. Do you know where that big cut is through there?

A. Yes sir.

Q. I will ask you where that is with reference to the city boundary?

A. As to the distances, do you mean?

Q. Does the city boundary go through that cut?

A. No sir, it does not. It is this side of the cut?

Mr. AITCHISON: Do you mean west?

A. Yes sir.

Mr. MALARKEY: There is a deep fill there west of the cut, is there not?

A. Yes sir.

Mr. AITCHISON: Where the cars of the Southern Pacific cross the track?

A. Yes sir.

Mr. MALARKEY: Does the city boundary cross the line at that fill?

A. I do not think it does.

Mr. MALARKEY: May I withdraw Mr. Mulchay a moment, I want to ask Mr. Richmond a couple of questions?

Mr. MALARKEY: Mr. Richmond, referring to the Springwater div. and the place where the line of the Springwater div. crosses
202 the city boundary about 3000 feet east of Golf Junction and 3000 feet west of Nickum, I will ask you to state what is the character of the track and the topography of the country around there with reference to the track at that point?

A. The line, after it passes 19th st., starts in to a fill at that point and the fill gradually increases until it gets to the Southern Pacific railroad track and where the east boundary of the city limits crosses and intersects that fill I should judge probably about 15 feet or 20 feet deep about that elevation. Starts in a fill at 19th st. and slopes right down to the creek bed from there and fill raises up above the creek bed and over the Southern Pacific Company's tracks and makes a fill I should judge of about 15 feet.

Q. Then the city boundary crosses the track of the Springwater div. right on that fill, does it?

A. Yes sir.

Q. And at the point described you think the fill at the track would be at least 15 or 20 feet higher than the natural level of the surrounding country, do you?

A. Yes sir.

Q. And as to this fill, Mr. Richmond, what is the length of the fill approximately. I mean whether a short fill or a long fill—what is the length of the fill?

A. I do not know exactly, but it is across that whole bottom.

Q. Is it one quarter or one half of a mile?

A. It is in the neighborhood of about 2000 feet I should judge.

Q. You think about 2000 feet, do you?

A. Yes sir.

Q. Are you able now to give an estimate of the percentage of the St. Johns line that is within the city of St. Johns?

A. No sir, not exactly, but I should say about one and one-half miles from the dividing line between Portland and St. Johns—about a mile and a half. It is about nine miles from here to St. Johns so that would be the proportion.

Q. Now referring back to the point where the city boundary crosses the line of the Springwater div.: Are there any streets or roads or highways at that point?

A. No sir, not improved.

203 Mr. WRIGHT: At what point do you refer to?

Mr. SEABROOK: The point where the Springwater div. crosses the city boundary.

Mr. MALARKEY: That is all, Mr. Richmond.

(Excused.)

Mr. MALARKEY: Now, Mr. Mulchay, will you state to the commission why it is in the estimation of the passenger tariffs on the Springwater div. that a five cent fare is charged to and from Nickum though it is about half a mile beyond the city boundary?

A. It was because Nickum was the only station, or rather, the first station east of the boundary line where a rate could be established. It is the first stop east of the city boundary line.

Q. In other words, if you charged more than five cents to Nickum, which is the first stopping place beyond Golf Junction, any passenger riding upon the cars has a right to ride in the city of Portland for five cents and could not insist upon having the cars stop and let him off there, is that what you mean?

A. Yes sir.

Mr. WRIGHT: That is a little bit leading.

Mr. MALARKEY: As a matter of fact I think it is manifest. I do not think it is necessary.

Mr. AITCHISON: That is all right.

Mr. MALARKEY: Referring to the point known as Lents Junction, Mr. Mulchay, which is, as has been testified to here, about one-half mile from Lents and is the point where the Mount Scott div. and the Springwater div. come together; I will ask you whether or not passengers coming from the stations known as Gilbert and Gates and other stations east thereof or towards Cazadero on the Springwater div. are, upon payment of the fare stated in this tariff, to Lents Junction given a transfer to the Mount Scott div. so as to get to Lents——

Mr. AITCHISON (interrupting): Given a transfer on the Springwater div., do you mean?

Mr. MALARKEY: Changes to Lents.

204 Mr. MALARKEY: For the same fares as the tariff shows to Lents Junction?

A. Yes sir.

Q. Referring now to the diagram marked "Exhibit 7"; the fare from Gilbert to Lents Junction as shown by this O. R. C. No. 1 is five cents. Now, if a passenger gets on at Gilbert and wants to go to Lents is he given a transfer at Lents Junction, which for the same five cents will carry him to Lents?

A. Yes sir.

Q. The fare, for instance, from Gates to Lents as shown by this tariff is 5¢. If a passenger gets on he can go from Gates to Lents for five cents by riding to Lents Junction and there being given a transfer for the same five cents, can he not?

A. Yes sir.

Q. And in the same way a person can get from Lents to Gilbert for 5¢, can he?

A. Yes sir.

Q. And from Lents to Gates for 5¢, can he not?

A. Yes sir.

Q. And each time can get a transfer at Lents Junction, can he not?

A. Yes sir.

Q. It is also shown in the tariff schedules—this O. R. C. No. 1—but so as to bring it out in this connection, I will ask you whether it is not a fact that the fare from these points, Gates and Gilbert here is five cents also?

A. Yes sir.

Q. And now what is the fact—state whether or not passengers boarding the cars or riding from Golf Junction on either the Springwater div. cars or the Oregon City cars into Portland can secure upon request transfers to any of the connecting lines of the Portland Railway Light and Power Company or the Portland Railway Company?

A. They can secure transfers by paying their fares to Nickum.

Q. Now just a minute. I wish to have this question read to you and have you answer the question (Stenographer read the last question to witness) Can they do that or not?

A. They can secure transfers.

Q. In other words, Golf Junction is a station within the city of Portland and any person getting on there gets transfers the same as city passengers, is that it?

205

A. Yes sir.

Q. Now, the regular tariff from Oregon City to Portland terminal at 1st & Alder sts. as shown by O. R. C. No. 1 is 25¢, and the regular tariff as shown by that schedule O. R. C. No. 1 from Oak Grove, Center, Courtney, Milwaukee Heights and Risley is 15¢, and the regular tariff from these different points named as shown by that O. R. C. No. 1 to the station on the city boundary known as Golf Junction is 5¢ less than amounts to terminal at 1st & Alder sts. Now, if passengers from these points see fit to ride first to Golf Junction for the rate 5¢ less than the rate to 1st & Alder sts. and then to become a city passenger from that point in as distinguished from interurban passengers, can they, upon payment of 5¢, secure transfers the same as any other urban passenger as distinguished from interurban passenger?

A. Yes sir.

Q. Now, then, Nickum you have testified, is because of the peculiar physical conditions existing on the Springwater div. between Golf Junction and Nickum, treated for the purposes of your tariffs and your regulations as though it were on the city boundary, is it not?

A. Yes sir.

Q. Now referring to Nickum: Do passengers paying 5¢ at Nickum, do they get a transfer upon request?

A. Yes sir.

Q. Is it within the 5¢ limits?

A. Yes sir.

Q. Referring now to people coming in from Gilbert or Gates: Suppose a passenger got on at Gilbert or Gates going to other points and paying 10¢ to ride to 1st & Alder sts., would they get transfers upon request?

A. No sir.

Q. They would not, did you say?

A. No sir, they wouldn't.

Q. Suppose, instead of doing that, they paid 5¢ to Nickum which the company treats as being on the city boundary and then paying 5¢, would they then get transfers?

A. Yes sir.

Q. Does the same thing apply to all these points beyond Gilbert and Gates on the Springwater div.?

A. Yes sir.

Q. The fare is 5¢ less than to Portland, is it not?

A. Yes sir.

206 Q. And referring to Nickum, which is treated as the city boundary, he could become a city passenger and secure transfer the same as any other city passenger by paying 5¢ fare, could he not?

A. Yes sir.

Q. Now then, taking the reverse of that situation, suppose a man is out on Willamette Heights or down to St. Johns and he wants to go to Oregon City, how much would it cost him to ride from St. Johns to Golf Junction?

A. Five cents.

Q. And he would get a transfer then from St. Johns car to the Oregon City car or any other car going to Golf Junction, would he not?

A. Yes sir.

Q. Then, having arrived at Golf Junction for five cents, how much much would it cost him to ride from there to Oregon City?

A. 20¢.

Mr. AITCHISON: I have wasted a lot of nick*les* in my life if that is true.

Mr. MALARKEY: We do all the law requires us to do—we publish and post our schedules with the railroad commission.

Mr. AITCHISON: Do you contend that you have filed with the railroad commission any regulations as to these transfers?

Mr. MALARKEY: I do not know that the city business is necessary to be filed with the railroad commission.

when given city transfers?

Mr. MALARKEY: I contend it is by virtue of this condition which is known.

Mr. AITCHISON: Do you not think you ought to file passenger tariffs for this travel from Lents and the larger points outside the city of Portland?

Mr. MALARKEY: Well, there is no question but what that is generally known.

Mr. AITCHISON: You are objecting that I had no knowledge of this because I was presumed to know——

Mr. MALARKEY (interrupting): The only thing the law requires us to do is to post our schedules and I want to say right here that the company——

Mr. AITCHISON (interrupting): We had better proceed with the case.

Mr. MALARKEY: Let me ask you this question: Now, on the other

hand, referring to the cars that are engaged in strictly city
207 business on the lines of the Portland Railway Light and Power Company, as, for instance, the 23d street line, the Sixteenth st. line, the Portland Heights line, the Upper and Lower Albina lines and many other lines of that character: Do the conductors on those lines have anything to do other than collect 5¢ fares?

A. No, sir.

Q. Are they equipped or in any — provided for the collection of other than five cent fares?

A. No, sir.

Q. Are they supplied with tickets from Portland to all the stations on the interurban lines?

A. No, sir.

Q. The Portland Railway Light and Power Company operates interurban lines over its Springwater div., from its Oregon City div. and also I think over a division now known as the Troutdale div., does it not?

A. Yes, sir.

Q. And have one way and round trip rates from Portland over its various divisions—these various interurban lines—there is a long schedule of fares, is there not?

A. Yes, sir.

Q. Would it be practicable, Mr. Mulchay, in the operation of the urban system, that is, the city lines as distinguished from the interurban lines, to provide every conductor on every street car engaged in urban business with the necessary information and authority to collect fare direct to the stations on these interurban lines?

A. No, sir.

Q. For instance, let me ask you how many street cars engaged in purely urban business as distinguished from interurban business are being operated each day by the Portland Railway Light and Power Company and the Portland Railway Company together, or do you know?

A. I do not know.

Q. Can you approximate the number?

A. Do you mean on all their lines?

Q. Excluding those engaged in the interurban business and the Oregon City div.—excluding them?

A. Well, there is about—on the Oregon Water Power city lines—about 35 cars I think in the city.

Q. Then how many on the Portland Railway Company's city lines?

208 A. I could not give you even an approximate figure on that. I am not familiar with the Portland Railway Company's lines.

Q. You are not connected with them, do you mean?

A. I am not familiar with them.

Mr. MALARKEY: Now assuming—Mr. Fuller says there are 210 approximately—the average number of cars in use on the Portland

Railway Company's lines. Assuming then 210 cars running on the urban or city lines of the Portland Railway Company and about 35 cars on the city lines of the Oregon Water Power, which is now the Portland Railway Light and Power Company, that would make about 245 cars engaged in urban business as distinguished from interurban business, and leaving out the question of extra men,—how many regular conductors does it take to run a car in the course of one day?

A. It requires two conductors to run a car during the course of one day.

Q. Then leaving out the question of extra men and all that, to operate these 245 cars engaged in urban business requires 490 conductors, does it not?

A. Yes, sir.

Q. Then if this interurban business was to be handled so that a person could get on a Willamette Heights car and pay their transportation and get a transfer to Oregon City for 25¢, and the same system was to be applied to all the city cars, it would necessitate all the conductors employed upon all the cars being fully informed and advised about all the regulations and fares concerned in interurban business, would it not?

A. Yes, sir.

Q. Is that practicable?

A. No, sir.

Q. Though a passenger upon getting on a car at Willamette Heights and riding to Golf Junction for 5¢, there are no regulations by which the conductor on the Willamette Heights cars can take 25¢ to Oregon City and give a transfer or take 80¢ for a ride to Cazadero and give a transfer and do those things?

A. No, sir.

Q. You said it would be impracticable and inconvenient to
209 do that because of the necessity of having all of the employés —all this great army of strictly city conductors—informed of all these things? What about the importance of time in handling those large sums of money, would that be an element that would interfere with the operation of the city business?

A. That would be a very important one.

Q. Now, how many different kinds and styles of tickets and transportation are in use on the Springwater and Oregon City divisions of the Portland Railway Light and Power Company?

A. Somewhere in the neighborhood of between *forth* and fifty different forms.

Q. That is to say their interurban business as distinguished from the urban business as conducted on the Oregon City div., the Springwater div., the Troutdale div. and the other interurban business necessitates that they have in use some *forth* or fifty different forms of transportation, is that what you mean?

A. Yes, sir, tickets.

Q. And if a transfer system between interurban business and urban business were to be established it would necessitate every conductor on every city line having to pass upon all these different

forms and handle all these different forms of transportation, would it not?

A. Yes, sir.

Q. And that would make every one of them a railroad conductor as distinguished from a railway conductor in handling 5¢ fares, would it not?

A. Yes, sir.

Q. And yet, with things as they are, people can ride and keep themselves city passengers until they get to the city limits and then become an interurban passenger if they choose instead of making themselves interurban passengers at First & Alder sts.?

A. Yes, sir.

Mr. AITCHISON: Do you think that is at all reprehensible if they do that?

A. No, sir, I do not.

Mr. MALARKEY: Now, Mr. Mulchay, I will ask you if you can give a comparative estimate of the amount of traffic on the St. Johns line between Portland and St. Johns and the amount of traffic on the Oregon City div. between Portland and the following stations taken together: Milwaukee Heights, Courtney, Oak
210 Grove, Center and Risley, as to the number of passengers carried? How many passengers ride from Portland to St. Johns and from St. Johns to Portland on the St. Johns div. as compared with the number of passengers that ride from Portland to stations on the Oregon City div. to stations named or vice versa?

A. I do not know except approximately. There is a great deal of difference in favor of the St. Johns line but I do not know how great.

Q. Is it two to one in favor of the St. Johns line, do you think?

A. Greater than that.

Q. Is it ten to one in favor of the St. Johns line, do you think?

A. Yes, sir, I believe it would be.

Q. Are you sure it would be as much as ten to one in favor of the St. Johns line?

A. Yes, sir.

Q. That is to say, that at least ten people ride to and from St. Johns as do on the Oregon City line from all these stations together—to and from all these stations referred to, do you?

A. Yes, sir.

Q. Are you, Mr. Mulchay—have you ever been down to Los Angeles?

A. No, sir.

Q. Do you know whether or not they have a very extensive interurban electric system down there?

A. Yes, sir.

Q. Do you know what fares are charged on the electric system down there from examination of the schedules?

A. I have a number of their schedules; yes, sir.

Q. Will you please produce them?

A. (Witness produces a number of schedules which are introduced in evidence and marked Exhibit 11 by defendant.)

Q. I will ask you if these are schedules showing the rates of fare charged on the Los Angeles interurban electric system, and if this letter attached thereto is the letter received by Mr. Fuller in response to a request for information on the subject?

Mr. WRIGHT: I object to that question but not to the schedule. He asked him if that was a letter received by Mr. Fuller.

211 WITNESS: It was the letter received by Mr. Fuller.

Mr. MALARKEY: They are offered in evidence and marked Exhibits 12 to 18.

Mr. WRIGHT: Plaintiff objects to exhibits 12 to 18 consisting of schedules of Los Angeles lines as being incompetent, immaterial and irrelevant.

Mr. MALARKEY: We would like to have it understood, Mr. Aitchison, that in offering these we would like to be able to withdraw them as they are the only copies we have, after they have served the purpose of this case.

Mr. AITCHISON: The only point is that if there is an action brought under section 32 we have to certify to these and use them for future cases. If you cannot get copies we may be able to return them.

Mr. MALARKEY: Do you know, Mr. Mulchay, what are the passenger fares charged by the Southern Pacific Company between Portland and Oregon City?

A. The rate is 50¢ between those points on the Southern Pacific.

Q. Did you say the rate is 50¢ between Portland and Oregon City on the Southern Pacific?

A. Yes, sir.

Q. That is the one way cash fare, is it?

A. Yes, sir.

Mr. AITCHISON: What is the distance?

A. Fifteen miles.

Mr. MALARKEY: Did you say 50¢ from Portland to Oregon City?

A. Yes, sir.

Q. That is the same ride that the defendant here charges 25¢ for, is it not?

A. Yes, sir, exactly.

Q. What are the fares from Portland on the Southern Pacific Company's line to intermediate points between Portland and Oregon City?

Q. They have four stops between Portland and Oregon City. First stop is Car shops, distance 3 miles, 15¢; Willsburg, distance 5 miles, 20¢; Milwaukee, distance 7 miles, 25¢; Clackamas, distance 11 miles, 40¢. All these rides are named in O. S. C. No. 31. I think that is the Oregon Railroad Commission number. I suppose it was intended for "O. R. C."

Mr. AITCHISON: What is the Interstate Commerce Commission's number?

A. 1105.

Mr. AITCHISON: Does the Southern Pacific Company attempt to compete with you?

A. They did up until recently, until the time of publishing this tariff.

212 Mr. AITCHISON: Do they compete with you now. Do you not know that they put this tariff into effect for the purpose of going out of competition with you?

A. The way I understood it—they said it was in order to give a through rate to Portland.

Mr. AITCHISON: They have repeatedly stated to us that they are unable to compete with electric lines for either freight or passenger traffic.

A. They have done it up to August 24th.

Cross-examined by Mr. WRIGHT:

Q. Mr. Mulchay, what is the capacity of the cars that you run on these Oregon City and Springwater divisions?

A. The regular cars on these divisions are 56 in capacity.

Q. Do they all have that capacity?

A. All regular cars do. Occasionally owing to breakdowns, due to defects generally, they put on smaller cars for a trip or two.

Q. These figures are for passengers furnished seats, are they?

A. That is the seating capacity.

Q. When you run cars containing 56 passengers, for which you built them, on any of these lines and they are run full, do those cars pay you?

A. Well, I never saw the statistics on it, but I presume they do.

Mr. MALARKEY: Do you know anything about that part of the business?

A. No, sir.

Mr. WRIGHT: When were these tariffs made which you filed with the commission—when were the rates first established?

A. Ever since I have been with the company, that is for the last four years.

Q. The same rates have been applied for the last four years, have they?

A. Yes, sir, about four years.

Q. Now, did you have anything to do with the making of these rates originally?

A. No, sir, they were all established before I came to the company.

Q. They were already established when you came to the company, were they?

A. Yes, sir.

213 Q. Now on these sheets which the defendant issued did you carry passengers from Portland to Jenne, which is 14.43 miles for 15¢? Do you know whether that rate was based upon running cars seating 56 passengers each?

A. No sir, I do not believe the seating capacity was considered.

Q. You think that was not considered, do you?

A. When the line was originally opened they had a smaller seating capacity.

Q. You think the cars had a smaller seating capacity then than now?

A. I believe there was a slight difference, perhaps 44 to 48.

Q. Then, in your opinion, this rate of 15¢ for 14.43 miles was bases upon running cars at that time which only seated 48 passengers?

A. When the line was originally established there were trailers attached to a locomotive—when originally opened.

Q. On the Oregon City div. you run the same kind of cars, do you not?

A. They have the same seating capacity.

Q. And the seating capacity has been the same for the last four years, has it not?

A. Yes sir, about the same.

Q. And you also run the same cars out to Lents as to seating capacity, do you not?

A. Sometime, from 44 to 56.

Q. You run no cars of greater seating capacity than 56, do you?

A. No sir, that is the largest we have.

Q. Now, in making a rate of 15¢ on your Oregon City div. your limit is 9.26 miles for 15¢ and you are running cars on both lines with the same seating capacity. Now can you explain to the commission wherein there is a difference in establishing these schedules for a greater rate on one division, as to whether there is other difference or whether the difference is as to mileage alone.

A. I believe that was due to an understanding at the time the line was opened to Gresham. I do not know whether there was a written agreement or not. The line had to secure right of way, I believe, and station facilities and it was due to that that Gresham was to receive the benefit of the same rate to Gresham as to Oregon City—the 25¢ rate the same as Oregon City receives.

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Mr. MALARKEY: Were you connected with the company when these arrangements that you say you "think about" were made?

A. No sir, I was not.

Mr. MALARKEY: Well, I shall object to Mr. Wright cross examining Mr. Mulchay about anything he has not been asked to testify to.

Mr. AITCHISON: You went into the reasonableness of the rates.

Mr. MALARKEY: He does not speak for that—the tariffs speak for themselves. He was not asked about that. He does not pretend to know about the cost of operating a car, as to whether seating capacity pays.

Mr. AITCHISON: You asked him all about the Portland Railway Company and the amount of business on the St. Johns line.

Mr. MALARKEY: Yes sir, that is true, but does that entitle them to cross examine him about things which occurred before he came with the company?

Mr. AITCHISON: He surely should not be asked to testify to anything except what he knows.

Mr. WRIGHT: He is here as an expert and I asked him why those rates are fixed in that way.

Mr. MALARKEY: I shall insist upon my objections because you have no right to ask those questions about something he does not know anything about. I will make my objections.

Mr. AITCHISON: What is your objection—that it is an improper cross examination? I have been unable to find any rule in an investigation of this sort that the commission is bound by the strict rules that would govern a court.

Mr. MALARKEY: They certainly cannot cross examine him about facts he does not know anything about.

Mr. WRIGHT: You spoke about them riding out to Gilbert.

Mr. MALARKEY: Well, go ahead and ask him questions. I will withdraw the objection.

Mr. WRIGHT: Have you looked up the old tariffs and arrangements that were made before your time with regard to these matters?

A. No sir.

215 Q. You are the traffic manager of this corporation, are you not?

A. I am the traffic agent; yes sir.

Q. And as such officer of the company what records and matters, data and statistics do you have in your charge?

A. I have no statistics that would furnish the information as to any rate—as to why they were established and how they were established.

Q. You are now traffic manager, are you not?

A. I am traffic agent; yes sir.

Q. If these rates were to be changed in any respect by the company at the present time who would be the one to make up the new schedules for any changes?

A. I would make them up.

Q. And those rates, I take it, would be, of course, submitted to the management but you would be the one to work them out, would you not?

A. Yes sir.

Q. If you were to do that, or if you were called upon by the officers of your company to inform them as to whether the commission was making a proper and just order for a change of rate, where would you go for information?

A. Well, I presume I would look and see if the business at the present time was paying at the present rates—about the first thing I would do.

Q. Is it not a fact, Mr. Mulchay, that you are running the same class of cars as to seating capacity on your Springwater div. out as far as Jenne and out as far as Center on the Oregon City div.?

A. They are the same style of cars and the same seating capacity, about.

Q. And on the one line you charge 15¢ and collect that fare from all passengers who ride from Jenne to Portland, do you not?

A. Same fare?

Q. You collect 15¢ from Jenne to Portland, do you not?

A. Yes sir.

Q. And from Center, Oak Grove and Courtney you would demand and collect from all passengers 15¢ to Portland, do you not?

A. Yes sir.

216 Q. And from Portland out to either place, you would collect the same fare, would you not?

A. Yes sir.

Q. Now, you have stated in your examination that the company has a practise of furnishing transfers to passengers who ride in from Portland—ride in from Oak Grove or Center or Courtney to Portland—if they pay 10¢ to Golf Junction and then pay the conductor another 5¢ thereafter, that is correct, is it?

A. Yes sir; after arrival at Golf Junction.

Q. If the passenger pays that he pays 15¢ just the same to the company, does he not?

A. Yes sir.

Q. As though he had paid to ride clear through to Alder St., does he not?

A. Yes sir.

Q. But the difference is that when he rides to Golf Junction he then gets another slip form which entitles him to ride on some other city line such as the Portland Heights, does he?

A. Upon the payment of an additional fare, he does.

Q. He gets a transfer, does he not?

A. Yes sir.

Q. The company has been, at all times they have had schedules in force, willing to transport (Wright's letter 11-27-07) passengers for 15¢ to Portland Heights or St. Johns, have they not?

A. Yes sir, we have carried—that is, upon the payment of a ten-cent rate to Golf Junction and passengers desiring transfers into the city pay an additional 5¢ into the city.

Q. The company is willing to transport (Wright's letter 11-27-07) passengers from Oak Grove, Center and Courtney to Portland or any other of these places which are mentioned in our complaint, which I take it you have read, have you not?

A. No sir.

Q. Just look at these places in the complaint on page 4 beginning with Portland Heights in that paragraph. Your company, at all times it has had these rates in effect, has been willing, has it not, to transport passengers from Oak Grove, Courtney and Center through to those places stated there for 15¢ provided they got this fare paid in those two amounts?

A. Yes sir.

217 Q. Has there ever been any bill, or circular, or notice of any kind put out by the company either posted on its station, or in the hands of conductors, or in the cars where the public could see it notifying them they could ride in this manner?

A. Our tariff specified it, that is all.

Mr. AITCHISON: Do you mean tariffs specify that transfer will be given?

A. No sir, specify rate of fare.

Mr. WRIGHT: But is it posted anywhere that transfer can be had by payment of those fares to Golf Junction?

A. Conductors have instructions to issue transfers. No, only with exception of conductors.

Q. Are the conductors instructed to inform the public every time they pay a fare from Oak Grove, Courtney and Center that if they pay to Golf Links, 10¢, that they can then get this transfer to the city limits by paying the other 5¢?

A. No sir.

Q. Do you know whether, as a matter of fact, that they do so inform the public?

A. I do not know.

Q. Now, if the company is willing, as you have just stated, to transport passengers for 15¢ through in the manner you say, can you explain why they do not either make the schedule directly to so state or else inform the public of it?

A. Why that is what we endeavor to do when we publish the tariff—to specify the rate into Portland, that is, from Portland to Gilf Junction, and rates beyond.

Q. You do not quite get my question: I asked, you having now stated that the company is willing to transport passengers for this price through to any of those points mentioned in the complaint, or to St. Johns, for 15¢, why does not the company either put that plainly in its schedule that these through fares and the transfers are given or else post notices that the public may know about it generally without having to refer to schedules?

A. Well, because it was not required of them to publish
218 them other than in the manner we have published them.

Mr. AITCHISON: These transfers are issued from Lents and Nickum, are they not, to points on the line of the Portland Railway Company?

A. Yes sir.

Q. Both Lents and Nickum are outside of the city, are they not?

A. Yes sir.

Q. These transfers are good on the East Ankeny line to Rose City Park, are they not?

A. Yes sir.

Q. That is outside of the city of Portland, is it not?

A. Yes sir.

Q. They are good to the 5¢ fare limit on the Vancouver line, are they not?

A. Yes sir.

Q. And may they be used in conjunction with 5¢ fare to Vancouver?

A. Yes sir.

Q. And on the Woodstock or Waverly-Richmond lines, may they?

A. Yes sir.

Q. Do not those lines extend outside of the city of Portland?

A. Woodstock and Vancouver lines do.

Mr. WRIGHT: A great deal was asked you about the trouble con-

ductors would have in making the tickets to these outside points. If the fare to Oak Grove, Courtney and Center was reduced either to ten cents or five cents to First and Alder sts. would it not be just as practicable to give transfers from those divisions on what is known as the old O. W. P. lines to the Portland Railway Company's lines as it is now?

A. No, we would have to use the same system as we do at the present time.

Q. State what that system is.

A. Collect through fare and issue what we usually term outside or city limits duplicate ticket.

Q. Supposing, instead of following this practise which has developed in this examination of charging the fare to Golf Junction from Oak Grove, Courtney and Center and then an additional fare from Golf Junction in upon which you give a transfer, you change the practise of the railroad and issue to your Oak Grove and
219 vicinity passenger a 15¢ ticket which entitle- him to a transfer, would it not then be just as practicable for the conductors on both systems to transact their business as it is now under your present system?

A. We do not issue a 15¢——

Q. I am not asking you that—I am asking you how it would be if you did?

(Question read to the witness.)

A. No sir.

Q. Why would it not?

A. Because that would be as I stated before—the conductors on the city lines would have to be supplied with necessary tickets in order to handle the interurban business.

Q. Now let us get down to this thing straight. I want you to understand it plainly and I want to be fair with you. I just told you and called your attention to the practise of getting those transfers. Now, suppose you had in place of that a 15¢ flat ticket to get in from Oak Grove, Center and Courtney and that ticket entitled the passenger to a city transfer instead of the way you run it now, would you then have any more difficulty in transacting the business of the Portland Railway Company and the Portland Railway Light and Power Company than you do now?

Mr. MALARKEY: He answered that question.

Mr. AITCHISON: Answer it again then.

Mr. WRIGHT: I want to be fair with the witness.

Mr. MALARKEY: You do not want to be fair, you asked him about the 15¢ fare from Oak Grove to Portland.

Mr. WRIGHT: Those very passengers are going in now on 15¢ fare.

A. We could issue a 15¢ ticket which would entitle a passenger to a transfer to a city line.

Q. Would there be any more difficulty in handling that way?

A. No sir, they could be handled going in that way.

Mr. AITCHISON: Would there be any difficulty in going out in a

conductor upon being tendered 15¢ saying "No, I will take
220 5¢ and you can pay 10¢ at the city limits going out? Would there be any difficulty in that sort of practise?

A. Well, there would be difficulty when it comes to a ticket.

Mr. A.: I am not talking about a ticket—cash fare. The conductors could tell the passengers, could he not, "I will take 5¢ and give you a transfer on the O. W. P. line which will take you to the city limits"?

A. That would be impracticable during the business hours of travel.

Mr. A.: You think it would be impracticable for him to pay a nickle, do you?

A. It would be impracticable for the conductor to tell each particular passenger.

Mr. A.: You think that is impracticable, do you?

A. Yes sir.

Mr. WRIGHT: When you give transfers now to any of the city lines, do not the passengers soon learn the system and ask for them all right?

A. Yes sir, they do.

Q. There is no trouble about it, is there?

A. No sir.

Q. And now going the other way, suppose you adopted a system of giving your general transfers to the O. W. P. by the Portland Railway conductors and it was left entirely to the old O. W. P. line conductor to take that transfer and collect the balance of the fare whatever your rate might be out to Oak Grove, Center or Courtney, would there then be any trouble about the city street car conductors carrying on that business?

A. No sir.

Mr. MALARKEY: That is the way we do it now under the present system.

Mr. WRIGHT: Do you know any reason why the company does not want to put up notices informing the public of these transfers that will enable them to go from Portland Heights or St. Johns out to Oak Grove, Courtney and Center for 15¢?

A. I do not believe the notices are published within the city—they are on the cars.

Q. Are there notices on the cars informing them that they can ride out to Oak Grove, Courtney and Center providing they get a transfer to Golf Junction? Is there any reason why the company
221 does not want to make it publicly known that such is the case by posting notices outside of these schedules that you file with the commission?

A. None that I know of.

Q. Is it not a fact that the public really never does see these schedules?

A. They are open to inspection at all times.

Q. Is it not a fact that these schedules which are filed with the railroad commission never are in prominent places where the public can easily see them?

Mr. MALARKEY: They are in the hands of the Railroad Commission.

Mr. AITCHISON: I might say for your information that we went along the line to see if they were posted and they were on file and could be inspected.

Mr. WRIGHT: There is no notice or paragraph or anything on these schedules especially calling the public's attention to this matter of transfers which they can get if they want to go out there, is there?

WITNESS: No sir, there is not.

Mr. AITCHISON: On the Vancouver line you collect the fare in three chunks, do you not?

A. Yes sir, zones.

Mr. A.: Would it not be practicable, for example, on the Oregon City and Springwater divisions to collect fare to the city limits and have the conductor re-set his register and collect from the city limits in?

A. That is, you mean to collect fare to Golf Junction and re-set his register from there in? That could be done.

Mr. A.: Then conductor could issue transfer to anybody and everybody could pay in two chunks or two zones, could they not?

A. Yes sir.

Mr. A.: Would that work a hardship upon the conductors?

A. It would work a hardship upon the company.

Mr. A.: Do you mean out on the Vancouver line?

A. No sir.

Mr. A.: That prevents fares being overlooked, does it not?

A. We have a hat checking system as far as Golf Junction.

Mr. A.: What is the density of traffic on the Springwater div. as compared with the Oregon City div.?

222 A. The distance is greater.

Mr. A.: Distance has nothing to do with density.

A. There is more opportunity for greater traffic.

Mr. A.: On which line?

A. On the Springwater line.

Mr. A.: Has the density increased or decreased on either of those lines in the last two years?

A. They are proportionately equal.

Mr. A.: You think they are proportionately equal, do you?

A. I think as to density they are proportionately equal.

Mr. A.: Do you consider the density at all in making rates?

A. Yes sir, in making a change of rates.

Mr. WRIGHT: Do you refer to the amount of passenger traffic?

Mr. AITCHISON: Number of passengers; yes sir.

Mr. WRIGHT: Something has been said about there being impracticability in charging less than 5¢ fares; Have you ever eaten lunch at the "Cafetera"?

A. No sir.

Mr. W.: I would like to invite you up there if you have not. Do

you object to investigating the system they have there of using copper coins?

A. I would be glad to investigate it.

Q. Do you know that the United States Government has copper coins for use in making change?

Mr. AITCHISON: I suppose that is pretty well within the knowledge of this commission.

Mr. WRIGHT: I presume it is not a matter of your judicial knowledge.

Q. Would it not be possible, Mr. Mulchay, to issue change in pennies if you choose to do so or in some kind of slips that would be so many of them bought at such a price, fares less than 5¢ multiples.

A. No sir, it would be almost impossible at some hours of the day.

Q. Do you not think you could devise slips of some kind which could be used for fares at different figures?

223 A. No sir, I don't think we could that would be satisfactory.

Q. You issue tickets now that call for 5¢ multiples, do you not?

A. We do, yes sir.

Q. And you could issue slips in place of cash fare charges that would cover the same thing if a man wanted to buy two, three, four or five of them, could you not?

Mr. MALARKEY: We do now if a man wants to.

Mr. WRIGHT: I refer now to the cash fare figures 15¢. Suppose it were 12¢ to the same point, could you not issue two tickets for 12¢ each and give the man 1¢ change? Could you do it?

A. We could.

Q. Could the conductor do it?

A. Not very well if the traffic were heavy.

Q. I refer now to your lines running outward to those points spoken of on the old O. W. P. line alone—not city lines?

A. The same conditions exist there.

Q. Is it not a fact that radiating out from the city of Portland in all directions that these lines run there is a limit beyond which what might be called suburban business does not go?

A. I do not think I understand your question.

Q. I will re-state it: Take your lines running out from Portland to St. Johns, to Lents, to Oak Grove, Courtney and Center, is there not a limit all around the circumference of the city of Portland beyond which purely suburban business does not travel?

A. That is, use the company's lines as a matter of transportation?

Q. No, I mean by "suburban business" the people who ride in and out of Portland upon your lines, practically daily—referring to that class of business, is there not always a limit out on your lines beyond which that class of business does not travel? Do you not understand yet?

Mr. AITCHISON: The point is, the man who travels daily on your line—works in Portland and lives in the country—do not go out farther than a certain distance from the center of population
224 and be a commuter or suburban; beyond that he is a small farmer.

A. Well, yes sir, some locations.

Mr. WRIGHT: I want to ask you as a traffic man if it is not a fact that as you go outward on your lines towards Cazadero, towards Oregon City or towards St. Johns there is always a limit somewhere—a mileage limit—on those lines beyond which this purely suburban business does not travel. Is that not a fact?

A. Yes sir, that is right.

Q. Now, is it not a fact that there is suburban business out as far as Oak Grove, Center and Courtney?

A. Yes sir, suburban, I presume.

Q. And there is suburban business to Lents, is there not?

A. Yes sir.

Q. Do they travel out as far as Gilbert suburban?

A. Yes sir.

Q. As far as Jenne, do they?

A. There is little if any to Jenne; I do not think there is.

Q. As far out as Sycamore, do you think?

A. Wilson would be the limit of suburban business on that line.

Q. You would say that Wilson would be the limit of suburban business on that line, would you?

A. Yes sir.

Mr. WRIGHT: I think I am through with the witness.

Re-examined by Mr. MALARKEY:

Q. Counsel asked you about the posting of notices advising the people on the Oregon City div. that they can pay fare to Golf Junction. You say there is no objection as far as you know to the posting of such notices.

A. Yes sir, that is correct.

Q. Now as a matter of fact these tariffs are posted and the information given as required by the law of the Oregon Railroad Commission, are they not?

A. Yes sir.

Q. And there is no effort made by the company or anyone to hide the information is there?

A. No sir.

225 Q. At any other point in the city—are the notices posted any more conspicuously on the cars coming from Willamette Heights that a person can transfer to South Portland than on the Oregon City cars going toward Golf Junction?

A. No sir.

Q. As a matter of fact there has been published in the various papers in the city of Portland the points at which transfers can be obtained on the lines of the Portland Railway Company and the Portland Railway Light and Power Company, has there not?

A. Yes sir.

Q. Do you not know, as a matter of fact, that your conductors have told passengers that they cannot have a transfer—to tell them they could not get it in that way, do you not know that?

A. They have done it.

Mr. AITCHISON: I handed the conductor a quarter on the Oregon City car and was told I was not entitled to a transfer.

Mr. MALARKEY: Did you offer him 20¢ to ride to Golf Junction?

Mr. AITCHISON: I did not.

Mr. AITCHISON: How about the man at Lents——

Mr. MALARKEY: If this commission thinks they are going to abrogate that contract they are going to have——

Mr. AITCHISON (interrupting): Do you contend that the regulations as to the issuance of transfers to all points outside of the city are covered solely by tariffs on file with us? Are there no others than those—are all the regulations as to the issuance of transfers covered by tariffs on file with us?

Mr. MALARKEY: The question before us is the question on this Oregon City div. I expect when I try a case I am trying it before the commission. The commissioner has been talking about his own personal experiences. I will ask the commissioner, so that our claim will be understood, we say to you that "there is our tariff and it says the rate from Oregon City to Golf Junction is 20¢." And, when you get to Golf Junction you are just the same as a city passenger and can get a transfer. Now then, of course,
226 if you got on a car and wanted to pay 25¢ when you got on at the—of course the conductor may have told you he could not issue one but he could. I will say right now that if this commission thinks that posting of notices will help out the situation any we have no objection to posting such notices.

Mr. AITCHISON: Do you not think that would conduce to a better feeling all around?

Mr. MALARKEY: I do not know.

Mr. WEST: Referring to the Los Angeles tariff sheets, Exhibits Nos. 12, 13, 14, 15, 16, 17 and 18: Do they cover the whole system of the Los Angeles Railway Company?

WITNESS: I do not know whether that covers the entire system.

Mr. WEST: Were they selected from those sent you by the Los Angeles people?

A. Those are some of the tariffs on file in the office.

Mr. AITCHISON: Are those all you have of that system?

Mr. WEST: What I am getting at is, are these selected for this particular purpose?

A. They have two or three systems down there and I do not know which those are.

Mr. MALARKEY: The commutation rates are not shown in here but if you want them I will send them to you.

Mr. M.: I supposed you wanted to see the things referring to cash fares. If you want those I will send them to you.

Mr. WRIGHT: I would like to ask Mr. Mulchay another queston. In the matter of these transfers now, if a passenger out on

the Springwater line traveling from Gilbert towards Portland, is his fare demanded of him by the conductor and when he is told that the fare is 10¢ and the passenger asks for a transfer, does the conductor tell him immediately "we cannot issue one" or does he tell the passenger "if you pay this fare in two installments you can get a transfer? What is the fact.

A. No, I do not think he does.

227 Q. Suppose a passenger says "I want a transfer", does the conductor promptly tell the passenger if he pays in two installments he can have one?

A. He has no instructions to that effect but I do not know whether he does or not.

Q. Out on the Oregon City div. if a passenger traveling in from Oak Grove asks what the fare is and is told 15¢ and says "I want a transfer", does the conductor tell him "You cannot have one" or does he say "You pay to Golf Junction and then pay another fare"?

A. That is something I do not know. They have no instructions to do so but they may do so.

Q. As a matter of fact does the conductor not tell him "You cannot have one."?

A. He probably does.

Q. I am speaking of transfers—does the conductor not tell him "You cannot have one."?

A. If he pays full fare he does not issue transfer.

Q. Does he go further and explain as to the other practise you have?

A. I do not think he does.

Mr. MALARKEY: Is there any discrimination by the company so far as you are advised concerning issuance of transfers to passengers on Springwater and Oregon City divisions?

A. No sir.

Q. Is it a practise to explain to passengers on the Springwater div. that they can get a transfer to Nickum? And is the fact concealed from any passenger?

A. No sir.

Q. There is no effort on the part of the company to make any discrimination, is there?

A. No sir, not at all.

Mr. WRIGHT: Is the business you speak of as being ten to one in favor of St. Johns, is that business out there at St. Johns suburban business?

A. It is considered city business.

Q. They come in from there to the city to do business, the people out there just the same as Oak Grove, do they?

A. The only difference between the two is, there is a great

228 deal of intermediate business on the St. Johns line.

Q. Is there not quite a large suburban business on the line as conducted between St. Johns and Portland?

A. Yes sir.

Mr. MALARKEY: Of course I think the commission understands this, but this all comes to this: Questions asked you by Mr.

Wright—do you mean to have the commission believe that the kind of business it conducts is inter-urban and is in the same sense inter-urban and of the same character as the Oregon City and Cazadero divisions? Is it not a matter of fact that it is not a subu*b*an business between Portland and St. Johns? Is it not a fact, Mr. Mulchay, that there are many people in business and have places of business in St. Johns that live in Portland?

A. Yes sir, I presume there are.

Q. And whose business are carried back and forth right along, is that not a fact?

A. Yes sir.

Q. And how about the dry dock out there, people going to and from Portland, which line do they use?

A. St. Johns line.

Q. And these passengers going between Portland and St. Johns—quite a manufacturing place, is it not?

A. Yes sir.

Q. And these iron works and tile works—do they not some of them live in Portland, various parts of the city of Portland?

A. Yes sir.

Mr. WRIGHT: I want to introduce a brief question here to Mr. Risley who has already been sworn, and I want to know whether you will also stipulate that the Portland Railway Company runs an inter-urban line between Portland and St. Johns?

Mr. AITCHISON: The character of that line has been shown clearly.

Mr. WRIGHT: I wish to offer the Annual Report of the Portland Railway Company filed with the Railroad Commission in evidence.

Mr. MALARKEY: Where is it?

Mr. WRIGHT: Right here I believe. There it is. I wish merely to show that they are filing the report with the Railroad Commission and I desire to offer it in evidence.

229 Mr. MALARKEY: I suppose I ought to object to this, that if, upon a rehearing of this case and this whole record has to be taken up, they cannot review you for excluding testimony. I object to these because it would make an unnecessarily large record if it had to be taken up.

Mr. AITCHISON: The commission will take notice that the Portland Railway Company has that report filed with it for the year 1907.

JOHN F. RISLEY—Re-examined.

Examined by Mr. WRIGHT:

Q. Mr. Risley did you attempt to ride from Gilbert into Portland over the lines of the defendant company at any time?

A. I did.

Q. When was that?

A. A year ago last March.

Q. You asked the conductor when you paid your fare for a transfer, did you?

A. I did.

Q. What did he say the fare was?

Mr. MALARKEY: I object to this because it was before the Portland Railway Light and Power Company owned this line and is foreign to anything before this case. We had no control over what some previous company told their conductor to do.

Mr. WRIGHT: If that is correct, that this was before, but I supposed that was the same concern. If necessary I would like to call Mr. Johnson as a witness.

Mr. WRIGHT: Now, as to any rebuttal testimony, I do not know of anything at this time. I wish to consult Mr. Paget and if he wishes to put in anything more I will so notify you right away, but, if not, I will consider this case as submitted.

Mr. WRIGHT, Mr. MALARKEY: Agreeable that case be submitted as follows:

Mr. AITCHISON: It is ordered that the plaintiff may have fifteen days from this date in which to file brief and serve the same upon defendant, and the defendant may have twenty days from
230 the time of service of same to answer the brief of plaintiff; and the plaintiff is then to have ten days in which to reply; and that the case will be set down for oral argument after plaintiff's reply by the commission and will then be considered as submitted.

Mr. WRIGHT: Be considered as the order in both the Milwaukee case and this.

Mr. WRIGHT: Unless I notify you to the contrary there will be no further testimony offered by us.

Commission stood adjourned at 12:30 o'clock p. m. October 31, 1907.

231 STATE OF OREGON,
County of Marion, ss:

I, F. Roy Davis, the official stenographer duly appointed by the Railroad Commission of Oregon, do hereby certify that the foregoing is a full, true and correct transcript in longhand of all the testimony, evidence and proceedings had on the above entitled investigation before said commission, carefully compared by me with my original notes thereof taken down by me, and I hereby certify the foregoing to be a correct statement of all the evidence and proceedings had on said investigation, as taken and transcribed by me.

Witness my hand officially, this 22nd day of November, 1907.

F. ROY DAVIS,
Stenographer of Railroad Commission of Oregon.

232 **Ex. 2. C. B. A., C'mm'r.**

This agreement made and entered into this 30th day of April, 1901, by and between the Portland, Chicago & Mt. Scott Railway Company, a cooporation duly created, organized and existing under the general incorporation laws of the state of Oregon and having

its principal office and place of business in the city of Portland, Multnomah County, Oregon, party of the first part, and the Portland City and Oregon Railway Company, a corporation duly created, organized and existing under the general incorporation laws of the state of Oregon, and having its principal office and place of business in the city of Portland, Multnomah County, Oregon, party of the second part; witnesseth:

That the party of the first part hereby contracts and agrees with the party of the second part that it will on or before sixty (60) days from the date hereof sell and convey unto the party of the second part by good and sufficient deeds of conveyance all of the property, real, personal and mixed of the party of the first part including its right-of-way and railway track as well as all other property; said property and all thereof to be sold, conveyed and turned over *the* the said party of the second part as aforesaid free of all claims and incumbrances whatsoever.

In consideration whereof the party of the second part hereby agrees that it will within sixty (60) days from the date hereof at its own expense and cost substantially and fully equip the said line of railway of the party of the first part hereby agreed to be conveyed running from Hawthorne Avenue in the city of Portland, Oregon, and thence in a southeasterly direction to the town of Lents in Multnomah County, with the poles and wires necessary for the transmission of electric power to propel cars from the town of Lents over the said line now owned by the party of the first part
233 hereby contracted to be conveyed and over the lines of railway of the party of the second part to and through the city of Portland, and to receive all benefits of transfer to other lines that exchange transfer privileges now or hereafter with lines operated by said second party; and the said second party agrees that within the said sixty (60) days from the date hereof it will have the said line in operation in connection with the present line of the party of the second part. And the party of the second part further agrees that as a consideration for the said conveyance so to be made by the party of the first part to it of said property hereinbefore mentioned that it, the party of the second part, will operate the said railway between the said points of termini, to-wit, between said town of Lents and that part of the city of Portland west of the Willamette river, and will run through cars thereover and will not make less than twelve trips per day with passenger coach or coaches each way, schedule to be arranged about as follows:—Leave Portland (terminus) every hour from 6:45 A. M. to 6:45 P. M., then 11:15 P. M., and Saturdays and Sundays 9:15 P. M. Leave Lents every hour from 5:55 A. M. to 6:55 P. M., then 1:30 P. M., and Saturdays and Sundays 9:25 P. M.; and the fare from the town of Lents or intermediate points to and through the City of Portland over the lines of the Portland City and Oregon Railway Company shall never exceed five cents (5¢) per passenger for a single continuous trip either way. It is understood that the party of the second part shall not be obligated to run the said number or any cars over said line in the event that it is made impracticable to do

so by reason of strikes, accidents or causes beyond the control of the party of the second part and while such conditions exist.

It is mutually understood and agreed that upon the execution of this contract the party of the second part may take possession and go upon all the property of the party of the first part and may proceed without interruption or hindrance from the part*h* of the
234 first part to make such improvements and changes and to do such work as may be necessary thereupon or thereabout for the purpose of placing said property and railway line in safe condition for operation as stipulated for in this contract; the present line of road to be operated as now laid except where road can be improved by easing curves or doing away with bridge or trestle work.

Provided, and this agreement is upon the express condition that if the said party of the second part shall at any time during the ten
term of [five]* years from the date hereof fail to perform the covenants hereinbefore contained by it to be performed substantially as provided; or shall, during said period, abandon the said road of the party of the first part, or attempt to tear up or remove the same or any part thereof except for necessary repairs or changes in accordance with the spirit of the foregoing agreement, the said party of the second part shall, upon demand of the party of the first part, turn back to said party of the first part all the property that may be conveyed and turned over to said party of the second part by said party of the first part pursuant to this agreement, free from incumbrance and in as good condition as the same may be in when so conveyed.

In witness whereof, the said parties hereto pursuant to resolutions of their respective boards of directors authorizing the same have caused these presents to be executed in duplicate by their respective presidents and secretaries and their corporate seals to be hereunto affixed the day and year first hereinabove written.

PORTLAND, CHICAGO & MT. SCOTT RAILWAY CO.,
(Signed) By C. G. GAMMANS, *President.*
PORTLAND, CHICAGO & MT. SCOTT RAILWAY CO.,
(Signed) By GEO. A. BRODIE, *Secretary.*

[Seal of Portland, Chicago & Mt. Scott Railway Co.]

PORTLAND CITY AND OREGON RAILWAY CO.,
(Signed) By W. H. BURLBURT, *President.*
PORTLAND CITY AND OREGON RAILWAY CO.,
(Signed) By WM. T. MUIR, *Secretary.*

[Seal of Portland City and Oregon Railway Co.]

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*NOTE.—Ten years inserted by consent. (Signed) Geo. A. Brodie, Sec'y P. C. & Ore. Ry. Co.

235 STATE OF OREGON,
County of Multnomah, ss:

I, C. A. Maney, do hereby certify, that I have compared the foregoing copy of agreement between the Portland, Chicago & Mt. Scott Railway Company and the Portland City and Oregon Railway Company, with the original thereof, and the same is a true and correct copy of the same and of the whole thereof.

In witness whereof, I have hereunto set my hand and notarial seal on this 29th day of October, 1907.

[SEAL.] C. A. MANEY,
Notary Public for Oregon.

236 Endorsed: No. 133. Certified copy agreement between Portland, Chicago & Mt. Scott Ry. and Portland City & Oregon Ry.

237 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, *by* B. LEE PAGET, as Relator, Plaintiff,

v.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

We hereby certify that the foregoing and annexed are the original exhibits introduced in evidence upon the hearing and investigation of the above entitled matter.

Dated at Salem, Oregon, this 11th day of March, 1908.

RAILROAD COMMISSION OF OREGON.
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

[Seal of R. R. Commission of Oregon.]

Attest:

E. G. MILLER,
Acting Secretary.

238 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Appellant,

v.

RAILROAD COMMISSION OF OREGON, Respondent.

Appeal from the Circuit Court for Marion County.

Hon. William Galloway, Judge.

Argued and submitted November 23, 1909.
Frederick V. Holman and Franklin T. Griffith, for Appellant.
A. M. Crawford and R. R. Giltner, for Respondent.
Moore, C. J.
Affirmed.

* * * * * * *

(Endorsed:) Filed Dec. 21, 1909, J. C. Moreland, Clerk. By ——— ———, Deputy.

239 MOORE, *C. J.*:

This is an appeal by the plaintiff from a decree confirming an order made by the defendant upon the complaint of B. Lee Paget and others, members of a voluntary association, commanding the plaintiff to desist from charging or collecting a fare of 15 cents for the transportation of any passenger on the Oregon City division between Portland and Milwaukee Heights, Courtney, Oak Grove, Center and Risley, which stations are collectively called the Oak Grove district, and not to demand or receive more than 10 cents for such service, and also to give to passengers between all stations in that district and Portland the same transfer privileges that the plaintiff grants to persons carried by it to that city on the Mt. Scott or the Springwater divisions. The facts herein are nearly identical with the incidents detailed in the Milwaukee case, and show that passengers are carried on the Mt. Scott division for 5 cents to Lents, where a further charge of 5 cents is made for carrying them to Lents Junction and other places to and including Gates. Passengers are also carried from Portland over the Oregon City division or the Sellwood branch to Golf Junction and thence east to Nickum for 5 cents, when a further charge of that sum is made for carrying them to Kerrigan, Lents Junction and other stations to and including Gates. The trackage distance from Portland or from the boundary thereof to Gates by the way of either of the divisions by which that station can be reached on the plaintiff's cars is farther than the trackage distance from the City of Portland or its limits to the utmost extent of the Oak Grove district. No transfers are given to passengers on the Oregon City division, although such privileges are granted to those that travel on the Mt. Scott and the Springwater divisions.

Such discrimination is unjust, and based on the conclusions reached in the Milwaukee case, the decree herein is affirmed.

240 Case No. 6968, Drawer No. 652.

Be it Remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 4th day of October, 1909. Whereupon on this Tuesday, the 21st day of December, 1909, the same being the 27th judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice,
Hon. Robert Eakin, Associate Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Woodson T. Slater, Associate Justice,
Hon. William R. King, Associate Justice, and
J. C. Moreland, Clerk,

when the following proceedings were had:

(Oak Grove Case.)

PORTLAND RAILWAY LIGHT & POWER COMPANY, a Corporation, Appellant,

v.

RAILROAD COMMISSION OF OREGON, Respondent.

Appeal from Marion County.

This cause having, on the 23rd day of November, 1909, been duly tried, argued and submitted to the court upon and concerning all the questions arising upon the transcript, record and evidence in this cause, and then reserved for further consideration. And the court, having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds there is not error as alleged. It is therefore ordered, adjudged and decreed by the court that the decree of the court below in this cause rendered and entered be and the same is in all things affirmed.

And the court, having considered the findings of fact and conclusions of law made by the court below in this cause, finds that the findings of fact are correct and are sustained by the evidence, and that the conclusions of law are correctly deduced therefrom. It is further ordered that said findings of fact and conclusions of law be, and they are, adopted and found as the findings of fact and conclusions of law in this court.

And the court, having examined the decree of the court
241 below, finds that it correctly adjudicates the rights of the parties hereto. It is now ordered, adjudged and decreed by this court that the decree of the court below in this cause rendered and entered be adopted, found and decreed to be the decree of this court in this cause.

And the said appellant, having given an undertaking on appeal, and also as a stay, with the American Surety Company of New York as its surety, it is further ordered that the respondent recover

off and from the appellant and its said surety its costs and disbursements in the court below taxed at $10.00, and its costs and disbursements in this court taxed at $ —; and also such sum as damages which may be found against the appellant in the court below in this cause under the terms of its said undertaking.

And it is further ordered by the court that this cause be remanded to the court below from which this appeal was taken with directions to enter a decree in accordance herewith, and to ascertain what damages, if any, have been suffered by the respondent and enter a judgment against the appellant and its said surety for such sum.

242 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff (Appellant),

vs.

RAILROAD COMMISSION OF OREGON, Defendant (Respondent).

Assignments of Error on the Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oregon.

Comes now the Portland Railway Light and Power Company the above named plaintiff (appellant) and files the following assignments of error upon which it will rely upon its prosecution of the writ of error in the above entitled cause from the Supreme Court of the United States to the Supreme Court of the State of Oregon, from the decree made by the Supreme Court of the State of Oregon on the 21st day of December, 1909, in the above entitled cause and the proceedings had prior thereto in the above entitled cause, and upon the decision of the Supreme Court of the State of Oregon in denying the petition for rehearing of the above named plaintiff (appellant) in the above entitled cause made and filed therein on the 7th day of June, 1910, and said plaintiff (appellant) respectfully submits that in the record, proceedings and decision in said cause and on said petition for rehearing and final judgment of the Supreme Court of the State of Oregon in the above entitled cause, there is manifest error in this, to-wit:

I.

That the court erred in holding and deciding that the order of the Railroad Commission of Oregon on which the above entitled suit was brought rendered on the 30th day of January, 1908, is not in conflict with and in violation of the provisions of Section 1 of the 14th Amendment of the Constitution of the United States of America, and which said order assumes and seeks (1) to deprive the above named plaintiff, (appellant) of its property without due process of law, (2) to deprive and to deny to the plaintiff (appellant) (a citizen of the State of Oregon) the equal protection of the law.

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II.

The court erred in holding that said order of the Railroad Commission of Oregon is not in conflict with and in violation of the provisions of Section 10 of Article I of the Constitution of the United States of America and that said order is not in violation thereof.

III.

The court erred in holding that by and under the provisions of said order of the Railroad Commission of Oregon plaintiff (appellant) is not deprived of its property without due process of law.

IV.

The court erred in holding that said order of the Railroad Commission of Oregon does not deny the plaintiff (appellant) the equal protection of the law.

V.

The court erred in holding that said order of the Railroad Commission of Oregon and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police powers of the legislative departments of the State of Oregon.

VI.

The court erred in holding that Chapter 53 of the General Laws of Oregon for the year 1907, enacted by the legislative assembly of the State of Oregon at the legislative session thereof held in the year 1907, does not abridge the rights, privileges and immunities of this plaintiff, (appellant) as guaranteed by the provisions of Section 1 of the 14th Amendment of the Constitution of the United States of America.

VII.

The court erred in holding that said order of the Railroad Commission of Oregon is not in violation of Section 10 of Article 1 of the Constitution of the United States of America, violating the obligation of contract.

VIII.

The court erred in denying plaintiff's (appellant's) petition for *for* rehearing duly filed in the above entitled cause.

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IX.

The court erred in construing Section 48 of Chapter 53 of the General Laws of Oregon for the year 1907, and the term "like and contemporaneous service" employed in said Section 48 as being limited to a consideration of relative mileage from the corporate limits of the City of Portland to different points on different lines of the railway of the plaintiff in error outside the corporate limits

of said City of Portland, and denying the right and duty of the defendant in error to consider all of the dissimilar circumstances and conditions surrounding the service between different points on said lines of railway, in determining whether or not the rates of fare charged by plaintiff in error on one of said lines are unreasonable or unjustly discriminatory, thereby denying to plaintiff in error the equal protection of the laws and abridging the rights and privileges of plaintiff in error guaranteed to it under the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

X.

The court erred in holding that defendant in error had the power under said Chapter 53 of the General Laws of Oregon for the year 1907, to enforce an order fixing a rate of fare for transportation to a point beyond the corporate limits of the City of Portland from a point within said city which allowed plaintiff in error no additional compensation for the portion of said transportation outside of said city, notwithstanding the fact that by franchise and contract between the plaintiff in error and the City of Portland, plaintiff in error is authorized to charge and collect the amount of fare so fixed by defendant in error for transportation entirely within said corporate limits and notwithstanding the further fact that by the provisions of said Chapter 53 the defendant in error is expressly prohibited from exercising any jurisdiction over the transportation of passengers solely within the limits of said city.

XI.

The validity of said act of the legislature of the year 1907, and of said order of the Railroad Commission of Oregon were drawn
245 in question by the plaintiff (appellant) on the ground that they were in conflict with and in contravention of Section 1 of the 14th Amendment of the Constitution of the United States of America, and the validity of said act and of said order were upheld and affirmed by the above entitled court and the said questions were necessary for the decision of this cause, and the court erred in holding that said act and said order were not in violation and contravention of Article 1 of the 14th Amendment of the Constitution of the United States of America.

XII.

The validity of said act of the legislature of the year 1907, and of said order of the Railroad Commission of Oregon were drawn in question by the plaintiff (appellant) on the ground that they were in conflict with and in contravention of Section 10 of Article I of the Constitution of the United States of America, and the validity of said act and of said order were upheld and affirmed by the above entitled court and the said questions were necessary for the decision of this cause, and the court erred in holding that said act and said order were not in violation and contravention of Section 10 of Article I of the Constitution of the United States of America.

XIII.

The court erred in granting and entering a decree in favor of defendant (respondent) and not entering a decree in favor of the plaintiff (appellant).

Wherefore, said Portland Railway Light and Power Company prays that the judgment, decree and decisions aforesaid may be reversed, annulled and altogether held for naught and that it may be restored to all things which it has lost by the action and because of the said judgment, decree and decisions.

FREDERICK V. HOLMAN,
FRANKLIN T. GRIFFITH,
Attorneys for Portland Railway Light and Power Company, Plaintiff (Appellant).

246 [Endorsed:] Case No. 6968, Drawer No. —. No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Railway Light & Power Co., Plaintiff & Appellant, vs. Railroad Commission of Oregon, Defendant & Respondent. Assignment of Error and Prayer. Filed June 13, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Plaintiff in error.

247 In the Supreme Court of the State of Oregon.

Case No. 6968.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Appellant,
vs.
RAILROAD COMMISSION OF OREGON, Respondent.

Petition for Writ of Error to the United States Supreme Court.

To the Honorable F. A. Moore, Chief Justice of the Supreme Court of the State of Oregon:

Now at this time comes the Portland Railway, Light and Power Company, a corporation, plaintiff and appellant herein, feeling itself aggrieved by the decision of the Supreme Court of the State of Oregon by that certain judgment and decree therein entered in the above entitled cause in favor of the defendant and against this plaintiff, on the 21st day of December, 1909, and petitions the above entitled Court for an order allowing said plaintiff and appellant to prosecute a writ of error to the Supreme Court of the United States under and according to the laws of the United States in that behalf provided, and said plaintiff and appellant says that in said judgment and decree and the proceedings had prior thereto in the above entitled cause, certain errors were committed to the prejudice of this

plaintiff and appellant, all of which will in more detail appear from the assignment of errors to be filed in the matter of such writ of error.

And said plaintiff and appellant asks that an order be made by the Supreme Court of the State of Oregon fixing the amount of security which said plaintiff and appellant shall give and furnish upon said writ of error, and upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

248 And said plaintiff and appellant further asks this Court for allowance of time in which to file its assignment of errors in this matter be fixed by this Court.

And said plaintiff and appellant further shows that a federal question was made in said cause necessary to the decision of said cause, to-wit:

That the order of the Railroad Commission of Oregon, against which said suit was brought, violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, and also Section 2 of Article XI of the Constitution of the United States, and that the said judgment and decree of the said Supreme Court of the State of Oregon is repugnant to and in conflict with said Section 1 of the Fourteenth Amendment and said Section 2 of Article XI of the Constitution of the United States, and that a decision of said federal questions was necessary to said judgment and decree rendered.

Wherefore, said plaintiff and appellant prays that a writ of error to said Supreme Court of the United States be allowed and that citation be granted and signed upon the plaintiff and appellant filing in the Supreme Court of the State of Oregon its assignment of errors and upon the filing and approval of such bond within the time fixed by the order of this Court as hereinbefore prayed for, and that upon compliance with such order and with the terms of the statute in such cases made and provided, said bond and writ of error may operate a supersedeas; and that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of said Supreme Court of Oregon be reversed, and that a transcript of the record, proceedings and papers in the above entitled cause duly authenticated may be sent to the said Supreme Court of the United States, and that an order be made that until the expiration of the time to be allowed by the Supreme Court of the State of Oregon for the filing of said assignment of errors

249 and bond that no mandate issue out of the Supreme Court of the State of Oregon to the Circuit Court of the State of Oregon for the County of Marion.

FREDERICK V. HOLMAN,
FRANKLIN T. GRIFFITH,
Attorneys for Portland Railway, Light and Power Company, Plaintiff and Appellant.

250 [Endorsed:] No. —. In the Supreme Court of the State of Oregon. Portland Railway Light and Power Company (a

corporation), appellant (Plaintiff), vs. Railroad Commissioner of Oregon, Respondent (Defendant). Petition for Writ of Error to Supreme Court of the United States. Filed June 9, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Frederick V. Holman and Franklin T. Griffith, Attorney- for Portland Railway, Light and Power Company.

251 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff (Appellant),

vs.

RAILROAD COMMISSION OF OREGON, Defendant (Respondent).

Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oregon.

The above entitled matter coming on regularly to be heard upon the petition of the Portland Railway Light and Power Company, plaintiff, (appellant) therein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oregon, and upon examination of said petition and the record in said matter and the assignments of error filed therein, and desiring to give said Portland Railway Light and Power Company an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is ordered that a writ of error be and it is hereby allowed to this court from the Supreme Court of the United States and that the bond for the sum of Twenty Thousand ($20,000.00) Dollars presented by said Portland Railway Light and Power Company is hereby approved which shall act as a supersedeas.

It is further ordered, that pending the determination of said writ of error, said Portland Railway Light and Power Company shall continue to issue to each person traveling as a passenger upon the Oregon City division of the railway of said plaintiff (appellant) between the stations of Milwaukee Heights, Courtney, Oak Grave, Center, Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, and paying a cash fare therefor of fifteen (15¢) cents, a receipt or other evidence to the effect that five cents of said fifteen cents cash fare has been paid by such person or passenger, subject to repayment to such person or passenger by said plaintiff (appellant), should the decree of this court in said cause be affirmed by the Supreme Court of the United States.

FRANK A. MOORE,
Chief Justice of the Supreme Court of Oregon.

Dated June 13, 1910.

252 [Endorsed:] O. G. Case No. 6968. Drawer No. —. Orig. No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., Plaintiff in error,

vs. Railroad Commission of Oregon, Defendant in error. Order allowing writ of error. Filed June 13, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman, Franklin T. Griffith, 811-814 Electric Bldg., Portland Oregon, Attorneys for Plaintiff in error.

253 In the Supreme Court of the United States.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF OREGON, Defendant in Error.

Know all men by these presents: That the above named Portland Railway Light and Power Company, as principal, and Oregon Surety and Casualty Company (a corporation duly incorporated, organized and existing under the laws of the State of Oregon, and having its principal office at the City of Portland, Oregon), as surety, are held and firmly bound unto the Railroad Commission of Oregon, (hereinafter called "said obligee") in the sum of Twenty Thousand ($20,000.00) Dollars lawful money of the United States to be paid to said obligee, its successors, representatives and assigns, and for the benefit of whom it may concern, the payment of which well and truly to be made, said principal and surety bind themselves and their respective successors jointly and severally by these presents.

Whereas, the above named principal has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Supreme Court of the State of Oregon.

Now, therefore, the conditions of this obligations are such that if the above named Portland Railway Light and Power Company shall prosecute its said writ of error, to effect and answer all costs and damages if it shall fail to make good its plea and shall pay all compensation of whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of said Railroad Commission of Oregon dated January 30th, 1908, as amended April 11th, 1908, had not been stayed and sus-
254 pended during the period transpiring from the time of taking said writ of error until the final determination of the above entitled suit in the Supreme Court of the United States as it or they may sustain by reason of said writ of error, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, said Portland Railway Light and Power Company has caused these presents to be signed in its corporate name by —— —— its President, and said Oregon Surety and Casualty Company has caused these presents to be signed in its corporate

name by its General Agent, a member of the Executive Board and by its General Counsel, this the 13th day of June, 1910.

PORTLAND RAILWAY LIGHT AND POWER COMPANY,
By B. S. JOSSELYN, *President.*
OREGON SURETY AND CASUALTY COMPANY,
DOOLY & CO.,
By FRANK E. DOOLY, *General Agent;*
[SEAL.] By GAY LOMBARD,
Member of Executive Board;
By WILBUR & SPENCER, *General Counsel,*
By R. W. WILBUR.

Bond Approved and to operate as a supersedeas.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

[Endorsed:] No. 6968. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Railway Light & Power Co., Plaintiff in Error, vs. Railroad Commission of Oregon, Defendant in Error. Bond on Writ of Error. Filed June 13, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorney for Plaintiff in Error.

255 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Portland Railway Light and Power Company, a corporation, and Railroad Commission of Oregon, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath

happened to the great damage of the said Portland Railway Light and Power Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty (60) days from the date hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said
256 Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, the thirteenth day of June in the year of our Lord one thousand nine hundred and ten.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH,
Clerk of the Circuit Court of United States for the District of Oregon.

Allowed by
FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:

[Seal Supreme Court, State of Oregon. 1859. The Union.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

257 [Endorsed:] Case No. 6968, Drawer No. —. In the Supreme Court of the United States. Portland Railway, Light and Power Company, a corporation, Plaintiff in Error, vs. Railroad Commission of Oregon, Defendant in Error. Writ of Error. Filed Jun- 13, 1910. J. C. Moreland, Clerk of the Supreme Court, by Arthur S. Benson, Deputy.

258 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Railroad Commission of Oregon, and to A. M. Crawford, Attorney General, and R. R. Giltner and R. E. Sewall, its attorneys, Greeting:

You are hereby cited and admonished to appear and be at the Supreme Court of the United States at Washington, D. C., within sixty (60) days from the date hereof pursuant to the writ of error filed in the office of the Clerk of the Supreme Court of the State of Oregon, wherein Portland Railway Light and Power Company is

plaintiff in error and you, said Railroad Commission of Oregon, are defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank A. Moore, Chief Justice of the Supreme Court of the State of Oregon, this thirteenth day of June in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court, State of Oregon. 1859. The Union.]

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:
J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

Due service of the within citation and receipt of copy thereof is hereby acknowledged this 16th day of June, 1910, at the office of the Attorney General of the State of Oregon.

A. M. CRAWFORD,
Attorney General, of Attorneys for Railroad Commission of Oregon, Defendant in Error.

259 STATE OF OREGON,
County of Marion, ss:

Franklin T. Griffith, of lawful age, being first duly sworn, on oath deposes and says:

That I was duly authorized and deputized by Honorable Frank A. Moore, Chief Justice of the Supreme Court of the State of Oregon, to serve upon the defendant in error the citation hereto attached. I served the same by delivering personally to R. E. Sewall one of attorneys of record for Railroad Commission of Oregon, defendant in error, a true and certified copy of said citation with all endorsements thereon, at Portland, Oregon, June 13th, 1910, at 4:30 P. M.

Witness my hand this 13th day of June, 1910.

FRANKLIN T. GRIFFITH.

Subscribed and sworn to before me this 13th day of June, 1910.

[Seal Clarence L. Eaton, Notary Public, State of Oregon.]

CLARENCE L. EATON,
Notary Public for Oregon.

260 [Endorsed:] No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., Plaintiff in error, vs. Railroad Commission of Oregon, Defendant in error. Citation. Filed June 16, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Plaintiff in error.

261 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff (Appellant),
vs.
RAILROAD COMMISSION OF OREGON, Defendant (Respondent).

Certificate.

I hereby certify that in the above entitled cause wherein Portland Railway Light and Power Company is plaintiff and appellant, and Railroad Commission of Oregon is defendant and respondent and the question before the above entitled court being the validity of that certain order of said Railroad Commission of Oregon dated the 30th day of January, 1908, as amended by its order of April 11, 1908, said Portland Railway Light and Power Company claims that said order as amended deprived it of its property without due process of law and that it violated the obligation of a contract in which said Portland Railway Light and Power Company is interested, and that said order of said Railroad Commission of Oregon as amended was repugnant to the Constitution of the United States of America, and that the decision of the above entitled court was against said Portland Railway Light and Power Company and said constitutional questions claimed by said Portland Railway Light and Power Company and that such decision was necessary to the decree rendered in the above entitled cause.

Dated the 13th day of June, 1910.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

262 [Endorsed:] No. 6968. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., Plaintiff & Appellant, vs. Railroad Commission of Oregon, Defendant & Respondent. Certificate of Federal Question. Filed June 13, 1910. J. C. Moreland, Clerk, By Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Appellant.

263 SUPREME COURT,
State of Oregon, ss:

I, J. C. Moreland, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Portland Railway Light and Power Company a corporation, plaintiff v. Oregon Railroad Commission, defendant, and also of the opinion of the court rendered therein and the decree entered thereon. That the transcript herein contains the Original Assignments of Error, Petition for Writ of Error, and Order Allowing same, a copy of the bond on appeal to the

U. S. Supreme Court, the Original Writ of Error, Citation and Certificate as to Federal Questions.

In testimony where-, I have hereunto set my hand — affixed the seal of said court at my office in Salem, Oregon, this 1st day of August 1910.

[Seal Supreme Court, State of Oregon. The Union. 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

264 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Oregon, in the city of Salem, this 1st day of August 1910.

[Seal Supreme Court, State of Oregon. The Union. 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

Costs.

Costs of Transcript $130. paid by the Portland Railway Light & Power Co., this 1st day of August 1910.

265 In the Supreme Court of the United States.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON, Defendant in Error.

It is hereby stipulated between the attorneys of the respective parties that the original exhibits on file in the above entitled cause known in the Supreme Court of the State of Oregon as Milwaukee case, No. 6967, and also in the cause of the same title known as Oak Grove case, No. 6968, may be used by the Clerk of the Supreme Court of Oregon in preparing transcripts on writs of error to the United States Supreme Court in said two causes in lieu of copies thereof, and the same to be transmitted to the Clerk of the United States Supreme Court as a part of the records on such writs of error.

It is further stipulated that said original exhibits may be considered in each of said cases as exhibits in each thereof.

It is further stipulated that this stipulation may be attached to

the transcripts in said two causes after the same are filed in the United States Supreme Court.

Dated this Fourth day of August, 1910.

FRED'K V. HOLMAN,
Attorney for Plaintiff in Error.
A. M. CRAWFORD,
Attorney for Defendant in Error.

266 Based on the foregoing stipulation, it is ordered that the original exhibits herein be transmitted to the United States Supreme Court as part of the transcripts on writs of error in the two cases mentioned in said stipulation, and that the foregoing stipulation and this order may be filed in the Supreme Court of the United States.

Dated August 4, 1910.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

267 [Endorsed:] No. —. In the Supreme Court of the United States. Portland Railway Light and Power Company, Plaintiff in Error, vs. Railroad Commission of Oregon, Defendant in Error. Stipulation as to Original Exhibits. Frederick V. Holman, Attorney for Pl'ff in Error, A. M. Crawford, Attorney for Def't in Error.

Endorsed on cover: File No. 22,294. Oregon Supreme Court. Term No. 120. Portland Railway Light and Power Company, plaintiff in error, vs. Railroad Commission of Oregon. Filed August 11th, 1910. File No. 22,294.

12

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Nos. ~~874 and 875~~ 119 & 120

PORTLAND RAILWAY, LIGHT & POWER COMPANY, PLAINTIFF IN ERROR,

vs.

RAILROAD COMMISSION OF OREGON.

MOTION TO ADVANCE.

A. M. CRAWFORD,
Attorney General of the State of Oregon,
For Defendant in Error.

(22,293 and 22,294.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Nos. 374 and 375.

PORTLAND RAILWAY, LIGHT & POWER COMPANY, PLAINTIFF IN ERROR,

vs.

RAILROAD COMMISSION OF OREGON.

MOTION TO ADVANCE.

Comes now the defendant in error, above named, and moves the court to advance the above-entitled cases on the docket, and that the same may be brought on for hearing earlier than in their regular order, and, if convenient to the court, be set down for hearing some time during the early part of January, 1912. And, as grounds for this motion, the defendant in error respectfully shows to the court:

That these are suits in equity, brought by the plaintiff in error against the defendant in error, in the Circuit Court of the State of Oregon for the County of Marion, restraining and suspending the operation of certain orders by the defendant in error until the final hearing and determination of these causes, and then that, upon such final hearing, to vacate and set aside such orders of the defendant in error.

That, in case No. 374, the order of the defendant in error was, in substance, that the plaintiff in error should cease and desist from demanding, charging, collecting or receiving, for the transportation of persons between Milwaukee, a suburb of Portland, and First and Alder streets, in the city of Portland, in either direction, the rates, fares, and charges set out in its Tariff O. R. C. No. 1, namely, 10 cents, and that the said plaintiff in error charge, impose, and collect, in lieu thereof, 5 cents each way, and furnish to each person paying said rate of 5 cents transfer privileges to lines of the company within the city of Portland.

That, in case No. 375, known as the Oak Grove case, the order of the defendant in error was, in substance, that the plaintiff in error should desist from demanding, charging, collecting or receiving, for the transportation of persons between Milwaukee Heights, Portland, Oak Grove, Center and Risley, and First and Alder streets, in the city of Portland, Oregon, in either direction, the rates,

fares, and charges set out in its Tariff O. R. C. No. 1, namely, 15 cents, and that it charge and collect, in lieu thereof, the sum of 10 cents each way, and furnish all persons who shall pay the said rate of 10 cents the same transfer privileges to the city lines of plaintiff in error as are accorded passengers traveling between Lents and First and Alder streets, in the said city of Portland, Oregon.

That case No. 374 is known as the Milwaukee case, and the station of Milwaukee is located 6.71 miles from the city of Portland, for which a charge of 10 cents is made, and no transfer privilege is given to city lines. The town or station of Lents is situated 7.69 miles distant from the city of Portland, and for which distance the plaintiff in error charges a 5-cent fare, with transfer privileges to its city lines. This was held by the Railroad Commission to be unjust discrimination. The company appealed to the Supreme Court of the State of Oregon, and the order of the Railroad Commission was sustained.

That, in case No. 375, known as the Oak Grove case, the station of Oak Grove is situated 8.48 miles distant, Center is 8.68 miles distant, Risley is 9.26 miles distant, and a charge of 15 cents is made for passengers from said line in either direction, to or from the city of Portland, with no transfer privilege to the city lines of the plaintiff in error, while Lents is situated 7.69 miles distant, as above mentioned, and a charge of 5 cents is made for travel

over the same, in either direction, with transfer privileges to its city lines. This was held by the defendant in error to be unjust discrimination. The plaintiff in error appealed to the Supreme Court of Oregon, where this order was also sustained; and plaintiff in error brings a writ of error to this court in both of said cases.

Defendant in error further respectfully shows to the court that many thousands of people use these lines daily, and are paying unjust rates and fares, and receiving no transfer privileges; that the order of the court was that all persons paying the fares during the pendency of the suits should receive a rebate check for the excess fare paid (that is, the difference between Tariff O. R. C. No. 1 and rates ordered to be substituted by the Commission); that the company gives these fares to the people who know these conditions and ask for same, but to others it does not.

Thus it is an advantage to the company to prolong the litigation, whether it wins or loses; also, that these rebate checks, being for 5 cents each, many are lost or mislaid, and the persons receiving the same will not be able to produce them and have them redeemed, providing these cases should be affirmed in this court.

The case is one of great importance to the State of Oregon, as other cases are awaiting decision, and it involves the right of the Railroad Commission of Oregon, among other things, to make an

order of this kind, where unjust discrimination exists.

Notice of this motion has been served on counsel for the plaintiff in error.

Respectfully submitted,

A. M. CRAWFORD,
Attorney General of the State of Oregon,
For Defendant in Error.

Nos. 119, 120. October Term, 1912.

IN THE

Supreme Court of the United States.

Office Supreme Court
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IN EQUITY.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,
Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Oregon.

BRIEF FOR PLAINTIFF IN ERROR.

FREDERICK V. HOLMAN,
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Attorneys for Portland Railway, Light & Power Company, Plaintiff in Error, and of Counsel.

International, 239 Chestnut St.

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IN THE

Supreme Court of the United States.

October Term, 1912. No. 119.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,

Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,

Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1912. No. 120.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,

Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,

Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF FOR PLAINTIFF IN ERROR.

By stipulation in this court briefs are not filed in each case, but the briefs in one case apply to both.

STATEMENT OF THE CASE.

Portland Railway, Light and Power Company, plaintiff in error, is a corporation duly organized and existing under the laws of the State of Oregon, engaged in the operation of railway lines in and about the city of Portland, Oregon. The Railroad Commission of Oregon, defendant in error, is the duly appointed Commission created by the act of February 18, 1907, of the State of Oregon (Acts 1907, p. 67). This statute authorizes the Commission to correct railway rates which are unreasonable or unjustly discriminatory. Two petitions were filed before the Commission under the provisions of this statute, one by the town of Milwaukie, Oregon, and the other by the Oak Grove Improvement Association, complaining of certain of the railway company's rates, and the Commission, on January 30, 1908, entered an order in pursuance of each petition, one being Number 89 F 18 (Milw. Rec., pp. 39, 42), and the second Number 94 (Oak Grove Rec., pp. 38, 42). The first order required the railway company to reduce the fare charged by it between the city of Portland and Milwaukie, a suburban point on the Oregon City division of the railway company, from ten cents to five cents; and the second order required the railway company to reduce the fares charged by it between the city of Portland and Oak Grove and other stations in what is known as the Oak Grove group of stations from fifteen cents to ten cents. Both of these orders directed the railway

company to give to passengers from all of these stations on the Oregon City division the same transfer privileges over lines in the city of Portland, as it gives to passengers from Lents, a point on its Mt. Scott division.

The railway lines of the railway company at the time of the entry of these two orders consisted of 95.53 miles of single track. The Oregon City division runs from First and Alder Streets in the city of Portland in a general southerly direction 5.36 miles to Golf Junction at the city line, thence to Milwaukie, 6.71 miles from First and Alder Streets, and thence through the Oak Grove group of stations and various other stations to Oregon City 14.47 miles from First and Alder Streets and one mile further south to Canemah, the terminus of this division. The Mt. Scott division runs from the junction with the Oregon City division at a point in the city of Portland not far distant from First and Alder Streets in a general easterly and then southerly direction through the town of Lents to Lents Junction on the Springwater division. On this division the city boundary line is 3.87 miles distant from First and Alder Streets, Lents is 7.69 miles distant, and Lents Junction is 8.31 miles distant. The five-cent fare limit extends to the town of Lents. (Milw. Rec., pp. 111 and 117, and Rwy. Co. Exh. No. 3.) The Springwater division runs from Golf Junction easterly within the city to the city line 5.95 miles from First and Alder Streets, thence .56 of a mile to Nickum 6.51 miles from First and Alder Streets, thence still easterly through Lents Junction, Gates and other stations and southerly to Cazadero, about forty miles from First and Alder Streets.

The railway company has divided its lines of railway into zones, within each of which it charges a cash fare of five cents. The law of Oregon provides (B. & C. Annotated Codes and Statutes of Oregon, Sec. 2096)

that it shall be unlawful for any corporation, operating a line of street railway within the corporate limits of any city, to charge a rate of fare to any passenger exceeding the sum of five cents for any one continuous trip in any one general direction between any two points on the street railway line of such corporation within the corporate limits of such city. In conformity with this law the railway company has made the boundaries of its inner or five-cent zone conform to the boundaries of the city of Portland, except at certain points where it has voluntarily extended the boundaries of such zone to include additional territory, as in the case of Lents on the Mt. Scott division and Nickum on the Springwater division. A table showing the distance of the several stations from First and Alder Streets and the extent of the different zones on the different divisions and the cash fares charged is given in the Milwaukie Record at pages 33 and 34. The railway company has also established a system of commutation rates which are set forth in its Exhibit No. 2. The railway company filed a map in the Circuit Court as its Exhibit No. 1 (Milw. Rec., p. 87), which shows its entire system of railway lines and the several points which are mentioned in this proceeding. These points are shown upon the section of map reproduced at the end of this brief.

The railway company instituted two suits against the Railroad Commission in the Circuit Court of Marion County for the purpose of vacating and annulling these two orders, the first case being known as the "Milwaukie case" and the second case as the "Oak Grove case." The court, upon application of the railway company, granted a temporary injunction suspending the operation of the orders, but requiring the railway company to issue to each passenger a receipt upon which he would be able to collect from the com-

pany the excess fare paid by him, in the event that the orders should ultimately be sustained. The testimony taken in these two cases was referred back to the Commission, which modified the orders, but in no effect material to the issues involved. The Circuit Court decided that the rates complained of were not unreasonable, but were unjustly discriminatory, and also that the railway company was unjustly discriminating against passengers coming to the city from the Oregon City division, in refusing to give them the same transfer privileges that it gives to passengers from Lents, and for these reasons the court sustained the orders and dissolved the injunction. The railway company took both cases by appeal to the Supreme Court of the State. A new injunction order was secured, under which the company was required to continue the issue of the receipts to passengers.

The Supreme Court of the State affirmed the judgment of the lower court in both cases and both are reported under the title, Portland Railway, Light and Power Company vs. Railroad Commission of Oregon, the first in 56 Oregon 468, 105 Pac. Rep. 709, and the second in 57 Oregon 126, 105 Pac. Rep. 715. A petition for a rehearing filed in both cases by the railway company was denied. The opinion upon the rehearing is reported in 56 Ore. 485, 109 Pac. Rep. 273. A copy of the original opinion in the Milwaukie case is printed in the Milwaukie Transcript of Record at page 244 and the opinion upon the petition for a rehearing at page 281. A copy of the original opinion in the Oak Grove case is printed in the Oak Grove Transcript of Record at page 165. The injunction has been continued and the company is still issuing the receipts to its passengers.

In reaching the conclusion that unjust discrimination existed, the Supreme Court compared the rates to Milwaukie and the Oak Grove group of stations with

the rates to Lents and Nickum and other points on the lines of the railway company. The distance from First and Alder Streets to all of these various points was considered by the court and also the distances from them respectively to the city boundary line of the city of Portland. The court held that the cost of the lines to the several points was immaterial, also that it made no difference whether a great many people or a few people lived in the several territories through which these lines ran. The railway company contended that all of the facts and circumstances, including particularly the two points mentioned above, should be given full consideration in determining the question whether a rate to a particular point was unjustly discriminatory when compared with the rate to another point. In view of the fact that the principal comparison made by the parties and the court was between the ten-cent rate to Milwaukie and the five-cent rate to Lents, the railway company showed that the line to Milwaukie cost half again as much as the line to Lents, and that on the line to Lents it carried more than ten times as many passengers as it carried to Milwaukie, and that on the former line it carried a great many short riders, whereas on the latter almost all of the passengers are through passengers. The railway company further argued that it was not fair to compare the distances of these two points from the city boundary lines, that is, 1.35 miles to Milwaukie and 3.82 miles to Lents, because the city boundary line on the Mt. Scott division to Lents is only 3.87 miles from First and Alder Streets, whereas the city boundary line on the Oregon City division on the way to Milwaukie is 5.36 miles from the same point.

In this litigation a contract called the "Lents contract" has been very frequently referred to. It is a contract, dated April 30, 1901, between the Portland, Chicago and Mt. Scott Railway Company and the Port-

land City and Oregon Railway Company. The Portland Railway, Light and Power Company has succeeded to all of the rights of the Portland City and Oregon Railway Company under this contract. It appears that the Portland, Chicago and Mt. Scott Railway Company had been organized by certain parties living at Lents and in that neighborhood for the purpose of constructing a line of railway connecting with the railway system in the city of Portland. By the terms of this contract the P. C. and Mt. S. Company agreed to turn over to the P. C. and O. Company all of its line of railway in consideration of an agreement by the latter company that it would equip and complete the line, run cars over it according to a specified schedule and charge a fare not to exceed five cents. The Railway Company does not rely upon that contract as a protection against the Commission. Its position in regard to this contract is fully set forth at a later point in this brief.

The substance of the position of the Railway Company in this case is that no unjust discrimination has been shown and further, even admitting the existence of unjust discrimination, the rates prescribed by the Commission are confiscatory, unreasonable, arbitrary and unjust, and, therefore, the orders are unconstitutional and void.

SPECIFICATION OF ERRORS.

First.—The court erred in holding and deciding that the orders of the Railroad Commission of Oregon on which the above-entitled suit was brought, rendered the thirtieth day of January, 1908, are not in conflict with, and in violation of, the provisions of Section I of the Fourteenth Amendment of the Constitu-

tion of the United States of America, which said orders assume and seek (1) to deprive the above-named plaintiff in error of its property without due process of law, and (2) to deprive and to deny to the plaintiff in error (a citizen of the State of Oregon) the equal protection of the laws.

Second.—The court erred in holding that by and under the provisions of said orders of the Railroad Commission of Oregon the plaintiff in error is not deprived of its property without due process of law.

Third.—The court erred in holding that said orders of the Railroad Commission of Oregon do not deny to the plaintiff in error the equal protection of the laws.

Fourth.—The court erred in construing Section 48 of Chapter 53 of the General Laws of Oregon for the year 1907, and the term "like and contemporaneous service" employed in said section 48, as being limited to a consideration of relative mileage from the corporate limits of the city of Portland to different points on different lines of the railway of the plaintiff in error outside the corporate limits of said city of Portland, and in denying the right and duty of the defendant in error to consider all of the dissimilar circumstances and conditions surrounding the service between different points on said lines of railway, in determining whether or not the rates of fare charged by plaintiff in error on one of said lines are unreasonable or unjustly discriminatory, thereby denying to plaintiff in error the equal protection of the laws and abridging the rights and privileges of plaintiff in error guaranteed to it under the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

Fifth.—The court erred in holding that defendant in error had the power under said Chapter 53 of the General Laws of Oregon for the year 1907, to enforce an order fixing a rate of fare for transportation to a point beyond the corporate limits of the city of Portland from a point within said city which allowed plaintiff in error no additional compensation for the portion of said transportation outside of said city, notwithstanding the fact that by franchise and contract between the plaintiff in error and the city of Portland, plaintiff in error is authorized to charge and collect the amount of fare so fixed by defendant in error for transportation entirely within said corporate limits and notwithstanding the further fact that by the provisions of said Chapter 53 the defendant in error is expressly prohibited from exercising any jurisdiction over the transportation of passengers solely within the limits of said city.

Sixth.—The validity of said act of the legislature of the year 1907, and of said order of the Railroad Commission of Oregon were drawn in question by the plaintiff (appellant) on the ground that they were in conflict with and in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and the validity of said act and of said order were upheld and affirmed by the above-entitled court and the said questions were necessary for the decision of this cause, and the court erred in holding that said act and said order were not in violation and contravention of Article 1 of the Fourteenth Amendment of the Constitution of the United States of America.

ARGUMENT.

The Fourteenth Amendment to the Constitution of the United States has been a great bulwark of protection to the railroads of the country against unjust and unreasonable regulations imposed by state legislatures or by commissions acting under the authority of state statutes. In a great majority of these cases the regulation complained of has been a regulation of rates and the complaint of the railroad company has been that the prescribed rates are confiscatory in that they are not sufficiently high to allow the railroad company to earn a fair return upon its capital invested in serving the public. It is well settled that if a railroad company can show that the prescribed rates will not allow it to earn a fair return, the rates will be declared unconstitutional, invalid and void for the reason that they deprive the railroad company of its property without due process of law and deny to it the equal protection of the laws.

This principle has been fully established by a long line of cases, including Reagan vs. Farmers' Loan & Trust Company, 154 U. S. 362; Smith vs. Ames, 169 U. S. 466; St. Louis, Etc., Railroad Co. vs. Gill, 156 U. S. 648, and Wilcox vs. Consolidated Gas Company, 212 U. S. 19.

The claim of the railroad companies in each of the above cases was that the rates prescribed were confiscatory. A rate prescribed by a commission may violate the constitutional rights of a railroad company even though it cannot be shown to be confiscatory. In Railroad Company vs. Smith, 173 U. S. 684, the regulation imposed upon the railroad company was that it should sell mileage tickets at less than the maximum rate allowed by law. The railroad company objected on the ground that the regulation was unjust and unreasonable and its position was sustained. The court used the following language:

"The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.

. . . . . .

"In holding this legislation a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws, we are not, as we have stated, thereby interfering with the power of the legislature over railroads as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public. We say this particular piece of legislation does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated."

The Fourteenth Amendment to the United States Constitution protects the railroad companies of the country against all unjust and unreasonable regulations. The power of the state authorities to regulate the railroads is limited to such regulations as can properly be designated reasonable and just. In this connection the opinions of the court in Wisconsin, Minnesota & Pacific Railroad Company vs. Jacobson, 179 U. S. 289, and in the case of Atlantic Coast Line Railroad Company vs. North Carolina Corporation Com-

mission, 206 U. S., page 1, are of interest. The Jacobson case came to the Supreme Court of the United States on writ of error from the Supreme Court of the State of Minnesota to review a judgment affirming a decision requiring track connections at an intersection of railroads. Mr. Justice Peckham spoke as follows:

> "Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action.
>
> "We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the plaintiff in error.
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> "The distinction between this case and that of Lake Shore & M. S. R. Co. vs. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. Rep. 565, is plain. There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald, and un-

mixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation could be rested, unless the simple decision of the legislature should be held to constitute such reason."

The case of Atlantic Coast Line Railroad vs. North Carolina Corporation Commission, 206 U. S. 1, came to the Supreme Court of the United States on writ of error from the Supreme Court of North Carolina. The State court had sustained an order of the State Corporation Commission requiring the Atlantic Coast Line Railroad Company to restore the connection at Selma with a train of the Southern Railway Company. The particular order in question was held not to violate any provision of the United States Constitution and the decision of the State court was affirmed, but Chief Justice White (then Mr. Justice White) in delivering the opinion of the court used the following language:

"As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property, like other property rights, finds protection in constitutional guaranties, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to

the due process and equal protection clauses of the Fourteenth Amendment. The result, therefore, is that the proposition relied upon is well founded if it be that the order which the court below enforced was of the arbitrary and unreasonable character asserted.

"In coming to consider the question just stated it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as, in substance and effect, to exceed regulation, and to be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws."

The Supreme Court of the United States in many recent cases has been called upon to pass upon the reasonableness of state statutes and orders of state commissions made under the authority conferred by state statutes. See the following cases:

C. M. & St. P. Ry. Co. vs. Minnesota, 134 U. S. 418;

Seaboard Air Line vs. Florida, 203 U. S. 261;

Atlantic Coast Line vs. Florida, 203 U. S. 256;

Seaboard Air Line vs. Seegers, 207 U. S. 75;

Missouri Pacific Railway vs. Nebraska, 217 U. S. 196.

The Portland Company contends that these orders of the Railroad Commission of the State of Oregon which it is undertaking to have vacated and set aside are unreasonable, confiscatory, arbitrary and unjust, and that they unduly, unfairly and improperly affect

its pecuniary rights and interests and deprive it of its property without due process of law and deny to it the equal protection of the laws.

In presenting its argument plaintiff in error will take up in order and elaborate upon the following sub-heads:

I. Decision of the Oregon Supreme Court.
II. The Lents contract.
III. The discrimination prohibited by the statute is unjust discrimination, which requires a judicial investigation of all the facts and circumstances, and there has been no such investigation in this case.
IV. The old rates were not unjustly discriminatory.
V. The transfer question.
VI. Even if unjust discrimination has been established that would not justify the Commission in prescribing confiscatory or unreasonable rates.
VII. These orders of the Commission are confiscatory.
VIII. These orders of the Commission are unreasonable, arbitrary and unjust.
IX. Conclusion.

I.

DECISION OF THE OREGON SUPREME COURT.

The Oregon Supreme Court points out that the Act of February 18, 1907, authorizes the Commission upon proper complaint to investigate and order just and reasonable fares upon finding that those complained of are unreasonable or unjustly discriminatory. The court found that the old rates were not unreasonable but that they were un-

justly discriminatory. It compared the ten-cent rate to Milwaukie with the five-cent rates to Lents and Nickum and held that the Milwaukie ten-cent rate was unjustly discriminatory as compared with these five-cent rates. It made a similar comparison of the fifteen-cent rate to the Oak Grove group of stations with the ten-cent rates to other points and reached a similar conclusion. Having determined that these old rates were unjustly discriminatory, it still remained to determine whether the reduced rates prescribed by the orders of the Commission were proper. The court determined that they were on the theory that the railway company having fixed a rate of five cents to Lents, thereby asserted the value of the services rendered and that it could not charge any more for similar services on the Oregon City division to points an equal distance beyond the boundaries of the city. The court also held that the passengers from Milwaukie and the Oak Grove group of stations were entitled to the same transfer privileges given by the Railway Company to the passengers from Lents. Other matters were considered, including particularly the force and effect of the Lents contract, but the foregoing is a fair statement of the substance of the decision. The following extracts from the three opinions, the first in the Milwaukie case (Milwaukie Record, p. 244), the second in the Oak Grove case (Oak Grove Record, p. 165), and the third upon the petition for a re-hearing (Milwaukie Record, p. 281), show that the foregoing statement is correct.

In the Milwaukie case the court said:

> "The ten-cent fare between Portland and Milwaukie is not unreasonable when compared with the charges made by other railway companies for similar service, but the Railroad Commission law authorizes an investigation upon a

complaint as to a charge which is in any respect 'unreasonable or unjustly discriminatory.' Sec. 28. It is not necessary, therefore, that the rate charged should be unreasonable, for if it is unjustly discriminatory, it is sufficient to authorize a regulation thereof. An examination of the evidence fully justifies the finding, made by the trial court in confirming the order of the Railroad Commission, that the rate from Portland to Lents and from such city to Nickum, and the transfer privilege granted to passengers on the Mt. Scott and the Springwater divisions, are unjustly discriminatory as against Milwaukie."

In the Oak Grove case the court said:

"The facts herein are nearly identical with the incidents detailed in the Milwaukie case (105 Pac. 709), and show that passengers are carried on the Mt. Scott division for five cents to Lents, where a further charge of five cents is made for carrying them to Lents Junction and other places to and including Gates. Passengers are also carried from Portland over the Oregon City division or the Sellwood branch to Golf Junction, and thence east to Nickum for five cents, when a further charge of that sum is made for carrying them to Kerrigan, Lents Junction, and other stations to and including Gates. The trackage distance from Portland or from the boundary thereof to Gates by the way of either of the divisions by which that station can be reached on the plaintiff's cars is farther than the trackage distance from the city of Portland or its limits to the utmost extent of the Oak Grove district. No transfers are given to passengers on the Oregon City division, although such privileges are granted to those that travel on the Mt. Scott and the Springwater divisions.

"Such discrimination is unjust; and, based on the conclusions reached in the Milwaukie case, the decree herein is affirmed."

Upon the petition for a re-hearing the court said:

> "Upon the other question, the discrimination as to the amount of fare charged the respective communities by plaintiff, we are not entirely free from doubt as to the proper remedy. It was said in the main opinion that 'the ten-cent fare between Portland and Milwaukie is not unreasonable when compared with the charges made by other railway companies for similar service.' Using that statement as a premise for an argument, it is urged in the motion that such statement is a finding that the specified rate is per se reasonable, which giving effect to the constitutional guaranties heretofore noted, precludes the state or its agent from making any reduction. But it was stated in immediate connection with that remark that the law authorizes an investigation upon a complaint as to a charge, which is in any respect 'unreasonable or unjustly discriminatory.' 'The fact that a rate is per se reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on Railroad Regulation, at section 839. 'If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness per se of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable. Beale and Wyman, Sec. 838."

It is therefore clear that the basis for the decision of the Supreme Court of Oregon was that the old rates were unjustly discriminatory and it was admitted that they were not unreasonable. The court having determined the existence of unjust discrimination, proceeded to consider the question whether the Commission was justified in prescribing the lower rates. After discussing the Lents contract, the court in the Milwaukie case said:

> "The contract rate of five cents, however, was taken as a basis of a reasonable compensation by which to measure the fare to be charged on the Oregon City division for an equal distance and for conceding the same transfer privileges that are granted on the Mt. Scott division."

At a later point in the opinion the court, after stating the argument of counsel that the reduced rates would not afford a reasonable return upon the capital invested and that it was not proper to speculate as to the probable effect upon the plaintiff's business or upon any change in the population or the value of the property in the affected district and that if any reduction was necessary, the cutting in half of the Milwaukie rate was excessive, unjust and unreasonable, used the following language:

> "We do not think it necessary to discuss either of these question; for the plaintiff having agreed to accept a fare of five cents for carrying passengers between Portland and Lents, thereby asserted the value of the employment so rendered, by which measure it must be governed for similar service on the Oregon City division an equal distance beyond the boundaries of the city of Portland."

The substance of the decision, therefore, is that unjust discrimination was established, both in the mat-

ter of fares and in transfer privileges, and that the railway company had itself determined that a five-cent rate to Milwaukie was a fair rate by charging that amount for service to Lents.

II.

THE LENTS CONTRACT.

It is important to understand the force and effect of this contract upon the rights of the parties to this litigation. A copy of the contract appears in the Milwaukie Transcript of Record at page 80. It bears date April 30, 1901, and the parties are Portland, Chicago & Mt. Scott Railway Company and Portland City & Oregon Railway Company. The Oregon Water Power & Railway Company succeeded to all of the property and rights of the Portland City and Oregon Railway Company and the Portland Railway, Light & Power Company succeeded to all of the property and rights of the Oregon Water Power & Railway Company. By this contract the Portland, Chicago & Mt. Scott Company agreed to sell and convey to the Portland, City & Oregon Company, all of its rights of way and railway track running from Hawthorne Avenue in the city of Portland to the town of Lents and the latter company agreed to equip the line for electric power and to operate it according to a schedule set forth and to charge not to exceed five cents. This agreement contained an express condition that if the Portland City & Oregon Company should fail within ten years to perform the covenants to be by it performed as set forth in the contract or should abandon the road or attempt to tear up or remove it, that company would upon demand of the Portland, Chicago & Mt. Scott Railway Company, turn back all of the property conveyed and turned over under this agreement.

The Supreme Court of Oregon in its opinion rendered in the Milwaukie case, considered the question whether the orders of the Commission impaired the obligation of this contract and held that they did not, for the reason that the company could not bind the Commission or restrict its action by any such contract, The court said:

> "Thus in Bullard vs. Northern Pacific R. Co., 10 Mont. 168, it was held that under the provisions of the Interstate Commerce law (24 U. S. Stat. 379) a contract made prior to the passage thereof (Feb. 4, 1887) for the transportation of freight at a rate and on terms violative of that law, could not be enforced against the carrier to recover rebates due upon goods carried after such act went into effect."

The court also points out that neither the orders of the Commission nor the decrees confirming them, conflict in any manner with the terms of this Lents agreement. We do not contend that the orders of the Commission of which we complain violate or impair any obligation of this Lents contract, nor do we contend that the railway company is protected by this Lents contract against rate regulation by the Commission. The court in discussing this point in the opinion rendered upon the petition for a rehearing said:

> "Plaintiff justifies the lower charge to and from Lents to the terminus in the city of Portland, first, on the ground that it is prevented from charging each passenger more than five cents fare, because of the alleged contract between its predecessor and the former owner of that portion of the road extending between Lents and Hawthorne Avenue. But this arises from the wrongful act of the plaintiff and its predecessor; that is, it had no lawful right or power as was held in the main opinion to thus bind the state or restrict it in its future regulation of fares."

As stated above we do not contend that the railway company had any lawful right or power to bind the state or restrict it in its future regulation of fares, nor do we contend that the Lents contract had or was intended to have any such effect. We do not admit, however, for a moment that the Lents contract is properly characterized as a "wrongful act." The situation presented at the date of this contract, to wit, April 30, 1901, was that the Portland, Chicago & Mt. Scott Railway Company had secured certain rights of way and had constructed thereon a certain railway line, which could be readily made to connect with the line of the Portland City & Oregon Railway Company in the city of Portland. The former company was owned or controlled by certain people living or owning land in the Lents district and no doubt the purpose of these people was to develop that territory. These people offered to sell and transfer these rights of way and this railway line to the Portland City & Oregon Railway Company, free and clear of all incumbrances and without any consideration other than the agreement of the Portland City & Oregon Railway Company to complete and equip the line and to run cars over it according to a specified schedule and to limit the fare to five cents. The arrangement was a perfectly reasonable one and did not involve any wrong to any one.

At a later point in this opinion upon the petition for a rehearing, the court said:

> "Plaintiff's second justification of the discrimination is that the cost of the construction of the line to Lents is fifty per cent. less than that of the line to Milwaukie, and in this connection it is also alleged that the agreement with plaintiff's predecessor to make a rate of fare not exceeding five cents to the people of Lents is based upon a consideration, being the value of the roadbed con-

veyed to plaintiff's predecessor in consideration of that agreement, but the right of one locality is not thereby increased, nor is the equal right of a competing locality diminished by municipal or other subscriptions advanced for the building of the road. Beale & Wyman, Sec. 839."

We do not deny that, in jurisdictions where unjust discrimination between localities is prohibited, the right of one locality is not increased nor the equal right of a competing locality diminished by special advantages given by one of the two competing localities. Beale & Wyman, in Section 839, refer to the Interstate Commerce Act or similar acts, which prohibit unjust discrimination as between localities. In section 831, they discuss the question whether any locality has a right to complain of rates at common law, and show that at common law the carrier deals with individuals and not with cities or towns and that the wrong, if any, is against the individual shippers at the various stations. The last paragraph of section 832 reads as follows:

"Except so far as it has an evidentiary bearing on the reasonableness of the rate in question, rates from other places or other points of shipment are not material at common law."

Section 838 is as follows:

"*General Principles of Statutory Regulation.*

"But though discrimination between localities is not illegal at common law, it is not infrequently made so by statute; and it is well to examine the question in some detail in order to reach a proper understanding of the statutory provisions. The rule does not forbid all differences between localities, but such only as are undue or unreasonable; for the statutes generally have a saving clause affecting dis-similar conditions and circumstances."

The first statute in Oregon bearing upon this proposition is the act of 1907, under which this rate regulation proceeding was instituted. Prior to that date the people living at Milwaukie and at the Oak Grove group of stations had no right to complain of any rate given by the railway company to the people of the Lents district. The people of Lents gave a good and valuable consideration to the predecessor of the railway company, "being the value of the roadbed conveyed to plaintiff's predecessor in consideration of that agreement," as stated in the opinion rendered upon the petition for a rehearing. It was a reasonable and proper contract for the parties to make, and the five-cent fare for which the contract provided was a reasonable and proper fare under the facts and circumstances. We may admit that after the act of 1907 was passed this Lents contract might not of itself be a good defence against a charge of unjust discrimination in rates. Still, prior to the passage of that act of 1907 the discrimination in rates as between these localities, if such discrimination existed, was fully justified by this Lents contract and was not a matter concerning which any one living on the Oregon City division had any right to complain. Moreover, since the question whether the fares were unjustly discriminatory must be determined upon a consideration of the conditions existing at the institution of this proceeding, any facts relative to conditions prior to that time are irrelevant.

It may be true that the Lents contract with its five-cent fare was responsible for the development of the Lents district. It may possibly also be true that, if the Milwaukie district had been given a five-cent fare, that district would have been developed just as rapidly as the Lents district. We do not believe that this would have been the result,

but we contend that it is entirely immaterial whether such result would have followed or not. The parties who petitioned the Railroad Commission to reduce these rates to Milwaukie and the Oak Grove group of stations, on the ground that they are unjustly discriminatory, based their cases upon the proposition that the five-cent rate to Lents had developed that district and that the ten-cent rate to Milwaukie had retarded the development of that district, and likewise the fifteen-cent rate to the Oak Grove group of stations had retarded the development of that district. Practically all of the testimony introduced by the parties undertaking to secure and sustain these orders related to these questions, that is, the great development of the Lents district and the retarding of the development of the Milwaukie district and the district tributary to the Oak Grove group of stations, and that the five-cent rate to Lents and the ten-cent rate to Milwaukie and the fifteen-cent rate to the Oak Grove group of stations had been responsible for this result. An examination of this testimony shows that the development of the Lents district had been accomplished prior to the filing of the petitions with the Railroad Commission for the reduction of these rates on the Oregon City division, in fact, prior to the passage of the act of February 18, 1907, creating the Railroad Commission and prohibiting rates that are unjustly discriminatory as between localities. These parties seem to have overlooked the fact that, in order to establish their case, they must show that the rates which they claimed were unjustly discriminatory must be shown to have been unjustly discriminatory at the time the petitions were filed. In the findings of fact, (of Circuit Court, Milw. Rec., p. 37, Oak Grove Rec., p. 35; adopted by Sup. Ct., Milw. Rec., p. 253, Oak Grove Rec., p. 166), the following appears:

"9.

"That before and at the time said Lents contract was entered into, the population of the territory contiguous to said railroad was small, that now the population of said territory is about 10,000; and the value of real estate in Lents and said territory has increased rapidly. That the said increase in population and land values has been and is due in a great measure to the fact that the plaintiff has charged and is charging but five cents for transportation of passengers between First and Alder Streets, in the city of Portland, and Lents, and intermediate points."

It will be noticed that this finding of fact relates to the population in the Lents district before and at the time the Lents contract was entered into. This finding of fact shows that the population had very materially increased as well as the value of real estate in the Lents district and that this increase in population and land values had been in great measure due to the five-cent fare. All of this may be absolutely true and yet it can have no bearing upon the right of any of the people living on the Oregon City division to a reduction of their rates. In order to establish any such right it must be shown that at the time they complained, their rates were unjustly discriminatory. The fact that the Lents district has a very much larger population than the Milwaukie district, or the district tributary to the Oak Grove group of stations, tends to show that the people living in the Lents district are entitled to a lower rate of fare than the people living in Milwaukie or at any of the Oak Grove group of stations. The fact that there are so many more people living in the Lents district than in these other districts on the Oregon City division establishes the fact that the line serving the Lents district is naturally a more profitable line, and that the people living in that district are entitled to a lower rate than people living in

a less populous district. The fact upon which the parties complaining of the rates on the Oregon City division placed most reliance, to wit, that the Lents district has become more populous, because it has enjoyed a five-cent rate of fare prior to the date when these complaints were filed with the Railroad Commission and prior to the passage of the act of February 18, 1907, has no bearing whatever upon the rights of the parties, except that it shows a reason for a lower rate to Lents than to Milwaukie and the Oak Grove group of stations.

Finding of fact No. 10 is open to the same suggestions which we have set forth above with reference to No. 9, and the same is true of finding of fact No. 11. Finding of fact No. 16 (Milwaukie Record, p. 37) is quite important. It reads as follows:

"16.

"That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. Scott divisions, the charges of the plaintiff for the transportation of passengers between said First and Alder Streets and the town of Milwaukie are unjust and unreasonable, discriminatory and give undue preference."

It will be remembered that the Supreme Court of Oregon did not find the rates to Milwaukie and to the Oak Grove group of stations unjust or unreasonable, but did find them unjustly discriminatory.

We admit that the Lents contract with its five-cent rate of fare, which we contend was fully justified because of the consideration set forth in the contract itself, may have been in large part responsible for the building up of the Lents district, but no one living on the Oregon City division had any

right to complain of that fact, certainly not until the act of February 18, 1907, was passed. All of the testimony and findings of fact and conclusions of law showing that prior to these dates the Lents district had been rapidly developed and that the development of the districts on the Oregon City division had been retarded and that the rates of fare to these respective districts were responsible for this result, has nothing whatever to do with the rights of the parties to this litigation.

It is very evident that there is a good deal of rivalry between the several suburban districts just outside of the city of Portland. The people living in each district are jealous of the progress made by other districts. The people living on the Oregon City division looked with envy at the rapid increase made in population by Lents and the adjoining territory. They were convinced that this result was occasioned by the five-cent fare enjoyed by the people of this territory ever since April 30, 1901, the date of the Lents contract. These people on the Oregon City division also could not help but see that Lents is 7.69 miles from First and Alder Streets and yet has a five-cent fare, while Milwaukie is only 6.71 miles from First and Alder Streets and the people are charged a ten-cent fare. They also could not help but see that Lents is 3.82 miles distant from the city boundary line, while Milwaukie is only 1.35 miles outside of the city. These distances of track mileage when considered in connection with the fares charged to the several points evidently made a very deep impression upon the people living at Milwaukie and at the Oak Grove group of stations. They were keen to secure a five-cent fare to Milwaukie and a ten-cent fare to the Oak Grove group of stations, if it was possible to do so, and as soon as the Oregon statute of 1907, prohibiting unjust discrimination as between localities, was enacted they commenced this proceeding. They overlooked the fact that any ad-

vance made by Lents prior to the enactment of this statute, whether due to the five-cent fare or any other cause, was not material to their case. They may have thought that they could eliminate the greater population of Lents and adjoining territory as one of the facts and circumstances to be considered in determining this question of unjust discrimination, if they could show that this greater population was due to the five-cent fare which the people in this district had been enjoying since the execution of the Lents contract. This proposition, of course, is not sound, but unless this was the view of the parties who petitioned the Railroad Commission to reduce these rates on the Oregon City division because of unjust discrimination, we are unable to see why all of this testimony was introduced showing the increase in population in the Lents territory prior to the enactment of the statute of 1907 and undertaking to show that this fact was caused by the five-cent fare for which the Lents contract provided. The Supreme Court of Oregon did not comment upon this matter, but based its decision upon track mileage alone. In considering the question of unjust discrimination track mileage alone will not determine the issue. There are many other facts and circumstances just as important, or even more important than track mileage, which must be considered before any sound conclusion can be reached upon the question whether the old rates to Milwaukie and to the Oak Grove group of stations were unjustly discriminatory; but the Lents contract is not one of these facts and circumstances. This contract required the railway company to charge a five-cent fare to Lents, but we do not contend that it is one of the facts and circumstances which can affect or determine the question whether under the statute the five-cent rate to Lents is unjustly discriminatory when compared with the ten-cent rate to Milwaukie or the fifteen-cent rate to the Oak Grove group of stations.

III.

THE DISCRIMINATION PROHIBITED BY THE STATUTE IS UNJUST DISCRIMINATION, WHICH REQUIRES A JUDICIAL INVESTIGATION OF ALL THE FACTS AND CIRCUMSTANCES, AND THERE HAS BEEN NO SUCH INVESTIGATION IN THIS CASE.

The Oregon Railroad Commission Act (Chap. 537, Laws of 1907) forbids only unjust discrimination. It does not forbid all discrimination, but only that which is unjust, the test being as to whether the service is "a like and contemporaneous service" (Sec. 48), or whether the preference or advantage is "undue or unreasonable" (Sec. 49), or whether any prejudice or disadvantage is "undue or unreasonable in any respect whatsoever" (Sec. 49), or whether the rates or fares are "in any respect unreasonable or unjustly discriminatory" (Sec. 28), or simply "unreasonable or unjustly discriminatory" (Secs. 28, 30 and 55). This, in the light of the decisions under the English statutes and under the Interstate Commerce Act, leaves no doubt as to what the law is under the Oregon statute.

Galveston Chamber of Commerce vs. Railroad Commission (Ct. of Civil App. of Texas, 1911), 137 S. W. 737;

R. R. Commission vs. Galveston Chamber of Commerce (Ct. of Civ. App. of Texas, 1908), 115 S. W. 94;

Cohn, et al., vs. St. Louis I. M. & S. Ry. Co. (Springfield Ct. of App. Mo., 1910), 133 S. W. 59;

State vs. Central Vt. Ry. Co. (Sup. Ct. of Vt., 1908), 71 Atl. 194;

Puget Sound Elec. Ry. vs. R. R. Commission of Washington (Sup. Ct. of Wash., 1911), 117 Pac. 739;

Platt vs. LeCocq (C. C., D. S. D., 1906), 150 Fed. 391;

Little Rock & Ft. S. Ry. Co. et al. vs. Oppenheimer et al. (Sup. Ct. of Ark., 1897), 43 S. W. 150;

Louisville & N. R. Co. vs. Commonwealth (Ct. of App. of Ky., 1898), 46 S. W. 702.

There can be no doubt that in determining whether unjust discrimination exists the court must take into consideration all of the facts and circumstances under which the transportation is carried on. In Texas & Pacific Ry. Co. vs. Interstate Commerce Commission (1895), 162 U. S. 197, the railway company attacked an order of the Commission which prohibited it from carrying any article imported into the country upon through bills of lading destined to any place within the United States, except for the charges described in its inland tariff covering other similar freight from the same port of entry to the same place of destination. The court said:

> "We come now to the main question of the case, and that is whether the Commission erred, when making the order of January 29, 1891, in not taking into consideration the ocean competition as constituting a dissimilar condition, and in holding that no circumstances and conditions which exist beyond the seaboard in the United States could be legitimately regarded by them for the purpose of justifying a difference in rates between import and domestic traffic."

Continuing, the court said (p. 219):

> ". . . we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the stat-

ute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust.' Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission. . . . The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

The court continued (p. 239):

". . . we think it plain that if, in such a case, the Commission . . . has unduly restricted its inquiries upon a mistaken view of the law, the court ought not to accept the findings of the Commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the Commission to be lawfully proceeded in.

"The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination. . . . The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is remanded to that court, with directions to dismiss the bill."

To the same effect are the following cases:

Little Rock & Ft. S. Ry. Co. vs. Openheimer (Ark.), 43 S. W. 150;
Louisville & Nashville R. R. Co. vs. Commonwealth (Ky.), 46 S. W. 702;
Wright vs. B. & O. R. R.,32 Pa. Super. Ct. 5;
C. & A. R. R. Co. vs. People, 67 Ill. 111;
Galveston Chamber of Commerce vs. R. R. Commission, supra;
Harp vs. Choctaw, O. & G. Ry. Co. (C. C., W. D. Ark., 1902), 118 Fed. 169; Affirmed by the C. C. A. (8th Cir., 1903), 125 Fed. 445.

The Supreme Court of Oregon considered track mileage as the determining element and, based upon that alone, held that the Railway Company's rates in controversy were unjustly discriminatory. It has been held frequently that mileage, while a circumstance to be considered with all the other facts and conditions in fixing rates, is by no means controlling or the most important.

Interstate Com. Commission vs. Louisville & N. R. Co. (1896), 73 Fed. 409;
Farmers' Loan & Trust Co. vs. Northern Pacific Ry. Co. (1897), 83 Fed. 249;
Weil vs. Pennsylvania R. R. Co. (1906), 11 Inter. Com. Rpts. 627.

In Interstate Commerce Commission vs. Louisville & N. R. Co., supra, the court said (p. 424):

". . . the mileage, while a circumstance to be considered with all the other facts and conditions, is by no means controlling or the most important. As early as 1872 it has been fully demonstrated in England that equal mileage as a basis

for settling the difficulty was entirely impracticable. In that year the committee upon the amalgamation of railways reported upon this subject, and the substance of this report is found in the note to the case of Ransome vs. Railway Co., 1 Nev. & McN. 63, which was one of the Coal Traffic Cases. In reporting against equal mileage, the committee said:

> '(a) It would prevent railway companies from lowering their fares and rates so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition and the company of a legitimate source of profit.
>
> '(b) It would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual goods brought in large and constant quantities, or for carrying for long distances at a lower rate than for short distances.
>
> '(c) It would compel a company to carry for the same rate over a line which has been very expensive in construction, or which, from gradients or otherwise, is very expensive in working, at the same rate at which it carries over less expensive lines. In short, to impose equal mileage on the companies would be to deprive the public of the benefit of much of the competition which now exists or has existed, to raise the charges on the public in many cases where the companies now find it to their interest to lower them, and to perpetuate monopolies in carriage, trade, and manufacture in favor of those routes and places which are nearest and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, not that the rates they themselves pay are too high, but that the rates which others pay are too low.' "

The Supreme Court of Oregon did not consider all of the facts and circumstances surrounding the transportation to Lents and Nickum as compared with the transportation to Milwaukie and to the Oak Grove group of stations, in deciding the question whether there was justification for the existing differences in rates. On the contrary, the court refused to consider any of the facts and circumstances excepting only the distance of the several points discussed from the boundary line of the city of Portland. This is clearly shown by the quotations given below from the several opinions.

This presents a situation very similar to that which was presented in the case of C. & A. R. R. Co. vs. the People, 67 Ill. 11. The Constitution of Illinois directed the legislature to pass a law to prevent unjust discrimination and extortion in rates. In pursuance of this constitutional provision the legislature passed an act prohibiting the railroads from charging a larger compensation for transportation of freight over any distance than it is charging at the same time for freight of the same class over less distance. The court held that this applied to discrimination between localities as well as to shipments over the same tracks and made track mileage the test of the discrimination. The court, after speaking of the constitutional provision, says (p. 23):

> "This provision, expressly directing the legislature to pass laws to prevent unjust discrimination, is a recognition of the palpable fact that there may be discriminations which are not unjust, and, by implication, it restrains the power of the legislature to a prohibition of those which are unjust. That was undoubtedly the object of the legislature in passing the existing law. This is clearly shown by its title. But the act itself goes further. It forbids any discrimination whatever, under any circumstances, and whether just

> or unjust, in the charges for transporting the same class of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust. The mere proof of the discrimination makes out a case against the railway companies, which they are not allowed to meet by evidence showing the reason or propriety of the discrimination. . . . The legislature can not raise a conclusive presumption of guilt against a natural person from an act that may be innocent in itself, taking from him the privilege of showing the actual innocence or propriety of the act, and confiscating his property as a penalty for the supposed offense. Those provisions of our constitution which forbid the deprivation of life, liberty or property, except by due process of law, and which guarantee the right of trial by jury 'as heretofore enjoyed,' and the right in all criminal prosecutions to appear and defend in person and by counsel, would all be violated by such a law. . . . That the naked fact that a railway company charges a larger sum for transporting freight of the same class over a given distance, than it is charging for the same distance over another part of its road, or in the opposite direction, is not, of itself, conclusive evidence of an unjust discrimination, will be manifest on a moment's consideration."

The court then comments upon the right of the railway company to charge higher rates where the cars have to return empty and proceeds as follows:

> "We give this illustration for the purpose of showing that a difference of price for the same distance of transportation, is not necessarily an unjust discrimination, and that any law must be fatally defective which infers guilt, as a conclusive presumption, from the mere fact of difference of rates, without permitting the companies to show why the different rates were adopted."

The court then comments upon the right of the railroad to offer any evidence it can by way of explanation of any alleged unjust discrimination, and then says:

> "It might, for example, show in the present case, that the lumber shipped to Lexington had caused a greater expense in loading or unloading than that shipped to Bloomington. This may not be a very probable defense, but defenses may nevertheless exist, and if they do, the companies should not be deprived of the right to make them.
>
> "Before this act can be enforced, it should be so amended as to correspond with the requirement of the constitution by directing its prohibitions against *unjust* discriminations. It should make the charging of a greater compensation for a less distance, or for the same distance, merely *prima facie* evidence of unjust discrimination, instead of conclusive evidence, as it now is, and it should give to the railway companies the right of trial by jury, not only on the fact of discrimination, but upon the issue whether such discrimination is just or not."

The Oregon statute of February 18, 1907, did not prohibit all discrimination but only unjust discrimination. The orders of the Commission, however, are based upon its conclusion that the old rates are unjustly discriminatory and it decides this question upon a consideration of track mileage only. When these orders are attacked by the railway company on the ground that unjust discrimination cannot be determined by track mileage only, but that all of the facts and circumstances must be taken into consideration, the answer given by the Supreme Court of the State of Oregon is that all of these other facts and circumstances may be disregarded and that track mileage alone is sufficient to determine the question of unjust discrimination. The Supreme Court of Illinois in the

case just discussed held that a statute framed on that basis was unconstitutional and void. It necessarily follows that an order resting upon the same basis must likewise be unconstitutional and void. The statute was amended after this decision was handed down and the amended statute was under consideration in Illinois Central R. R. Co. vs. People, 121 Ill. 674, also in People vs. Baltimore & O. S. W. R. Co., 246 Ill. 474. The above case in 67 Illinois was affirmed in these two later cases.

IV.

THE OLD RATES WERE NOT UNJUSTLY DISCRIMINATORY.

One of the principal points upon which the railway company has relied and still relies in its effort to have these orders of the Commission set aside is that no such unjust discrimination has been shown or exists. We will first examine the reasons given by the Supreme Court of Oregon for its conclusion that these old rates are unjustly discriminatory. In the opinion in the Milwaukie case the court presents the question very clearly in the following language:

> "It is insisted that the cost of constructing the Mt. Scott division was fifty per cent. less per mile than that of the Oregon City division, that the number of passengers on the latter line, north of Milwaukie, is less than one-twentieth of those over the Mt. Scott division, and that the service performed is so dissimilar, and rendered under such diverse circumstances and conditions, as to make the difference in fare between Lents and Portland and between that city and Milwaukie not unjustly discriminatory against the latter town."

It would be difficult to put the question more clearly and we naturally expect that the court will

satisfactorily answer it. The opinion proceeds as follows:

> "In the vicinity of the Mt. Scott division is a district between the city boundary and the town of Lents which contains many people, and, based on this fact, it is argued that the Lents contract, in effect, makes such territory a part of Portland, and extends to the inhabitants of that locality the five-cent fare, that, considering the question of unjust discrimination, the comparison of fares must be a relative estimate of the respective distances from the city boundary, and that for all practical purposes the remoteness from the Portland terminal should be computed as if all such district were within the corporate limits of that city. The five-cent rate of transportation for a continuous trip in one direction between any two points extends by compulsion to the boundary of Portland (B. & C. Comp. Sec. 2096), where the second district of rates begins, unless the first division is voluntarily continued beyond that circuit."

Note the suggestion in the last clause of the above quotation. It indicates that the railway company might voluntarily extend the five-cent zone beyond the city boundary lines. That is exactly what the railway company did. For reasons which to it seemed quite sufficient it did not confine the five-cent zone to the city boundaries, but voluntarily extended that zone beyond the city boundaries in the direction of Lents and included the Lents territory in that zone. When attention is called to the fact that the city boundary is only 3.87 miles from First and Alder Streets on the line of the Mt. Scott division, which runs to Lents, and that it is 5.36 miles from the same point on the Oregon City division and 5.95 miles on the line of the Springwater division, one very good reason is shown for the extension of the five-cent zone to take

in the Lents territory. At a later point in this brief attention will be called to several other very good reasons which led to the same result. After the language quoted above, the opinion proceeds as follows:

> "As fares outside that city on suburban lines of railway now consist of multiples of five cents, all ten-cent rates would be expected to begin at the point of intersection of the line of the road and the city boundary from which place the extent of the second district should be computed. By making the limits of the municipality the beginning of all ten-cent fares no discrimination against any locality can exist except such as the peculiar form of the boundary may sanction; and the several districts, coinciding with the respective multiples of five cents, ought to be parallel with the exterior boundaries, if the railway lines were built at right angles thereto."

But the railway company has voluntarily taken the Lents district into the five-cent zone and there is no evidence whatever to show that this was improper action on its part, in fact, the testimony clearly establishes that the extension of the five-cent zone so as to take in Lents was a reasonable and proper act on the part of the railway company.

The court has fallen into error in adopting the city limits as the limits of the five-cent zone. The company was prohibited by the law of the State and by its franchise from the city of Portland from restricting the five-cent zone to narrower limits than the city boundary lines; but neither the statutes of the State nor the franchise under which the company operates within the city of Portland prevents the company from extending the five-cent zone to take in territory outside of the city limits.

Immediately after the above, the court concludes this paragraph with the following sentence:

> "The density of the population along the Mt. Scott division, between the city limits and the town of Lents, does not make that territory a part of Portland, nor can the Lents contract, in effect incorporate such district within that city."

The court next proceeded to consider the meaning of the words "like and contemporaneous service" in the statute and the force and effect of the failure of the statute to use the words "under substantially similar circumstances and conditions." After this digression, the opinion returns to the subject discussed above and we find the following language:

> "The cost of constructing and maintaining a portion of a railway, and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based on particular divisions of the road, but upon the entire system."

We have quoted above everything that the court has to say in this opinion upon the question which, as shown above, it so clearly presented for discussion, that is, whether the several facts, to wit, that the Oregon City division cost fifty per cent. more to construct per mile than the Mt. Scott division and that the number of passengers on the latter line north of Milwaukie is many times less than the number on the Mt. Scott division and that the service performed is so dissimilar and rendered under such diverse circumstances and conditions, constitute a sufficient basis to justify an extension of the five-cent zone to include Lents, so that the ten-cent rate to Milwaukie was not unjustly discriminatory when compared with the five-cent rate to Lents. It can hardly be said that the court satisfactorily answered that question. The fact that the line to

Milwaukie cost much more to construct than the line to Lents is a pretty good reason for charging a higher rate of fare to Milwaukie than to Lents. The further fact that the travel over the line to Lents is many times as heavy as the travel over the line to Milwaukie, is another pretty good reason for charging more for a ride to Milwaukie than for a ride to Lents. The court passes over these points without comment excepting such as is set forth in the last quotation from the opinion to the effect that these arguments do not make Lents a part of the city of Portland. This is all true, but it is aside from the point. All of these propositions do make it reasonable and proper to include the Lents district within the five-cent zone and they all represent very good arguments in favor of the proposition that a ten-cent rate to Milwaukie is not unjustly discriminatory when compared with the five-cent rate to Lents.

All that the court had to say in its original opinion in the Milwaukie case concerning the dissimilar circumstances and conditions surrounding transportation over the two lines in controversy has been set forth. It said nothing on this point in its original opinion in the Oak Grove case. In its opinion, denying the railway company's motion for a rehearing (56 Ore. 485, 109 Pac., 273; Milwaukie Record, p. 283), the only discussion of this question is the following:

> "Plaintiff's second justification of the discrimination is that the cost of the construction of the line to Lents is fifty per cent. less than that of the line to Milwaukie and in this connection it is also alleged that the agreement with plaintiff's predecessor to make a rate of fare not exceeding five cents to the people of Lents is based upon a consideration, being the value of the roadbed conveyed to plaintiff's predecessor in consideration of that agreement, but the right of one locality is not thereby increased, nor is the equal

> right of a competing locality diminished by municipal or other subscription advanced for the building of the road. Beale and Wyman, Section 839."

Although the court decided, as set forth in this quotation from the opinion, that the Lents contract did not justify the lower rate to Lents, it did not decide the question whether the greater cost of construction on the Oregon City line than on the Lents line was any justification for this lower rate. It did not discuss at all any of the other facts and circumstances surrounding the transportation to these two points respectively.

At a later point in the first Milwaukie opinion the court uses the following language:

> "It will be remembered that the rate to Lents was established pursuant to the terms of an agreement, but it appears that the plaintiff voluntarily made a five-cent fare on the Springwater division from Portland to Nickum, which latter place is .56 miles outside the city limits, and thereby manifested a preference for Nickum as against Milwaukie, which is 1.35 miles outside such boundary."

Notice the comparison of the distances from the city boundary to these two points. Milwaukie is two and a half times as far from the city limits as Nickum is. Here again the railway company has voluntarily extended the five-cent zone so as to take in Nickum, and the reason for this voluntary extension cannot be better stated than in the language of the court which immediately follows the above quotation. It said:

> "The reason assigned in the brief of plaintiff's counsel for such discrimination is that where the Springwater division crosses the city limits, the roadbed consists of a high fill that extends east quite a distance to a deep cut, which latter continues beyond Nickum; that at the boundary no public highway exists by which passengers can

> approach the railroad; that the nearest place where the railway can be reached without trespassing on private land is at Nickum; and that in consequence of such obstacles the cars cannot be stopped at the city limits. A passenger would be entitled to ride on this division from Portland to the city boundary for a five-cent fare; and, if he refused to pay a greater sum for further transportation he could be ejected from the cars at that place. Whether or not he could leave the track without going up or down it to some station where a public highway could be found is a question that affects the plaintiff only to the extent that the absence of such road or street might have a tendency to diminish travel, to overcome which and to promote the interests of the railway company, passengers are carried to Nickum. This, in our opinion, under the present statute, amounts to a discrimination."

See the testimony of Richard Scott, the Commission's witness, upon these points at page 199 of the Milwaukie Record.

Under the circumstances outlined above the most reasonable thing that the railway company could do would be to extend the five-cent zone beyond the city boundary so that it would take in Nickum. The railway company must carry to the city boundary line for a five-cent fare because the statute and its franchise from the city of Portland requires it. In view, however, of the situation presented at the city boundary on the way to Nickum as set forth in the above quotation, what possible objection could there be to the extension of the five-cent zone so as to take in Nickum. The railway company would certainly be subject to very severe criticism by the public, if it pursued the suggestion made in the foregoing quotation, that is, if it ejected any of its passengers at the city boundary where this line to Nickum crosses it, upon refusal to pay another fare. The nearest reasonable stop-

ping place is Nickum and the railway company very properly carries its passengers to that point without demanding an extra fare.

If it be true that the old rates were not unjustly discriminatory, it necessarily follows that the orders reducing them were arbitrary, unjust and unreasonable and on that account unconstitutional and void, because of the fact that the alleged unjust discrimination was the only basis upon which the court sustained them. We have heretofore indicated certain of the reasons which sustain the position of the railway company, that a ten-cent fare to Milwaukie is not unjustly discriminatory against that point, when compared with a five-cent fare to Lents. These reasons may be analyzed and classified as follows:

First.—The cost of constructing the Oregon City division to Milwaukie is fifty per cent. more per mile than the cost of constructing the Mt. Scott division to Lents. On this point see the testimony of F. I. Fuller, which appears at pages 155 and 156 of the Milwaukee record.

Upon the authority of Texas & P. R. Co. vs. Interstate Commerce Comm. (1895), 162 U. S. 197, whatever would be regarded by common carriers as matters warranting a difference in charges, ought to be considered in forming a judgment whether such differences were or were not "unjust." No one would deny that such a difference in the cost of construction would be regarded by common carriers as a matter warranting a difference in charges.

Second.—The Mt. Scott division runs through a thickly settled portion of the city of Portland for fifty-six blocks and beyond the city boundary the line runs on a street which is built up almost like a city all the way out to Lents. The cars stop at every street crossing within the city limits and there are about twenty-

three stations (Milwaukie Rec., p. 111) between the city limits and the town of Lents. The Oregon City division, on the contrary, after running a few blocks only from First and Alder Streets, runs through a district which is not built up at all and there are practically no stops on the line to Milwaukie except Golf Junction, which is just inside of the city boundary and is the point where the Springwater division leaves the Oregon City division. See testimony of J. J. Miller, a witness introduced by the railway company (Milw. Rec., pp. 118, 121); see also the testimony of John Risley (Milw. Rec., p. 212), Richard Scott (Milw. Rec., p. 195) and George N. Hively (Milw. Rec., p. 217), witnesses introduced on behalf of the Commission.

In Railroad Commission of Ky. vs. Louisville & Nashville R. R. Co., 13 Inter. Com. Com. Rep. 300, the Commission said (p. 307):

> "There is greater density of population and of traffic in the territory north of the Ohio River known as Central Freight Association territory, and in which Evansville is situated, than in territory south of the river in which Owensboro and Henderson are situated. Such differences in conditions reasonably and inevitably result in a different adjustment of rates in the respective territories. Generally the cost per ton of handling freight decreases in proportion to the increase in its volume."

Third.—A very large majority of the passengers who travel on the Mt. Scott division ride less than one-half of the entire distance that it is possible to ride for a five-cent fare. There are a great many short riders who pay their fares, ride a short distance, leave the cars and make room for other passengers. On the Oregon City division, on the contrary, over ninety per cent. of all of the passengers ride the entire distance

from First and Alder Streets to and beyond the city boundary. See testimony of J. J. Miller, a witness introduced by the railway company (Milw. Rec., pp. 118, 121); see also the testimony of John Risley (Milw. Rec., p. 212), Richard Scott (Milw. Rec., p. 195) and George N. Hively (Milw. Rec., p. 217), witnesses introduced on behalf of the Commission.

As explained by Mr. Fuller, the vice-president of the railway company and general manager of its railway department (Mil. Rec., pp. 157, 158), it is possible in operating street car lines within thickly populated districts to carry passengers in any one general direction for a maximum charge of five cents, even though the length of the possible ride may be fourteen miles, as in the city of Portland, for the reason that a great majority of the passengers travel a short distance and it is very rarely that a passenger will travel the full distance permitted for a single fare. See the testimony of Isaac Hill (Milw. Rec., p. 89), John B. Bigham (Milw. Rec., p. 95), Louis E. Armstrong (Milw. Rec., p. 99), Joseph M. Hart (Milw. Rec., p. 104), Frederick Heger (Milw. Rec., p. 109) and J. J. Miller (Milw. Rec., pp. 118, 119, 120).

Fourth.—In the year 1907, which was the year immediately before the taking of the testimony in this case, the total cash fares received and tickets sold on the Oregon City division was 1,174,421, showing that for the 15.47 miles of this division there were 75,916 riders per mile. On the Mt. Scott division for the same period the total number of cash fares taken and tickets sold amounted to 2,299,570 for the 8.38 miles of this division, showing 276,735 riders per mile of road. See Defendant's Exhibit No. 17. See the testimony of G. A. Brodie (Oak Grove Rec., p. 91), J. J. Miller (Milw. Rec., p. 119), Richard Scott (Milw. Rec., p. 196) and John Risley (Milw. Rec., p. 208).

If we compare the traffic density to Milwaukie with the traffic density on the Mt. Scott division, the difference in favor of the Mt. Scott division is even more marked. The railway company's Exhibit No. 10 shows that the total of tickets and cash fares to Milwaukie during the year 1907 was 187,458. The distance to Milwaukie from First and Alder Streets is 6.71 miles, which gives us a traffic density of 27,937 per mile as compared with a traffic density on the Mt. Scott division, 8.31 miles, of 276,735, a proportion of approximately ten to one.

That the volume of traffic creates a dissimilar condition has been repeatedly held by the Interstate Commerce Commission as well as by the courts.

Perry vs. Florida Co., 3 Inter. Com. Rep. 740;
I. C. C. vs. Ala. Midland R. R. Co., 168 U. S. 145-171;
Root vs. Long Island Co., 4 L. R. A. 331;
Dallas Freight Bureau vs. Mo. Kansas & Texas R. R. Co., 12 Inter. Com. Rep. 427;
Rice, Robinson & W. vs. Western N. Y. & Pa. R. R. Co., 2 Inter. Com. Rep. 298.

Fifth.—The city boundary line on the Mt. Scott division is only 3.87 miles from First and Alder Streets. In view of the fact that the city boundary line on the Oregon City division is 5.36 miles from the same point and on the Springwater division 5.95 miles from the same point, it seems only reasonable and proper that the five-cent zone should be extended beyond the city line on the Mt. Scott division, and the natural place to which to extend it is the town of Lents.

In view of all of these facts and circumstances it would have been an unjust and unreasonable act on

the part of the railway company if it had charged passengers from First and Alder Streets to Lents more than five cents. A five-cent fare to Lents under these facts and circumstances represented fair and full compensation for the service rendered and yielded to the railway company a fair return upon the amount of its capital invested in that part of its property. The five-cent fare to Lents pays the railway company very much better than the ten-cent fare to Milwaukie. The company could earn money on its business to Lents charging only a five-cent fare, but it lost money on its business to Milwaukie charging a ten-cent fare.

The theory of the Supreme Court of Oregon evidently was that the facts and circumstances surrounding the transportation on these several lines within the city of Portland was a matter of no importance in view of the fact that under the city franchise and under the State statute the railway company was prohibited from charging more than five cents for any ride within the city limits. If we consider the city limits as the limits from which the second five-cent charge shall commence, that is, if the five-cent zone is bounded by the city limits, it would appear to be unreasonable to carry a passenger through the city and on out to Lents for one five-cent fare and to charge ten cents for a similar ride from any point in the city to Milwaukie. Lents is three and one-half miles outside of the city limits while Milwaukie is only one and thirty-five one-hundredths miles outside of the city limits.

On this theory, the voluntary five-cent rate to Lents would make it necessary for the company to put into force and effect a five-cent rate from First and Alder Streets or any other point in the city of Portland to any point three and one-half miles beyond the city limits. We doubt whether the Supreme Court

of Oregon would sustain this position, for in its opinion it indicates that the company might voluntarily extend the five-cent zone to points outside the city limits. That court did not mean to indicate that if the railway company voluntarily extended the five-cent zone to one point outside the city limits, it would be necessary for it to extend that zone to all points equally distant beyond the city limits. The basis upon which the court determined that the ten-cent fare to Milwaukie is unjustly discriminatory, when compared with the five-cent fare to Lents, is entirely taken away when we appreciate that the railway company has done exactly what the court indicated it had the right to do; that is, voluntarily extended the five-cent zone to take in the Lents district. There is nothing in the evidence nor in the opinion of the court which indicates that the extension of the five-cent zone to take in the Lents district was unreasonable or improper or unjustly discriminated in favor of Lents as against any other town or section, but on the contrary, the evidence discloses facts which fully justify that extension. The whole basis of the court's finding of unjust discrimination is built up upon the theory that the five-cent zone is bounded by the city limits. The question which should determine whether there was any unjust discrimination, is the question whether under all the facts and circumstances the railway company was justified in extending the five-cent zone so as to include the Lents district. When the facts and circumstances presented by this record are given fair consideration, there can be no reasonable doubt that the railway company was fully justified in taking the Lents district into the five-cent zone, and if that conclusion is sound, it necessarily follows that the charge of unjust discrimination has not been established.

The court in the Oak Grove case called attention to the fact that the track mileage from the boundary of Portland to Gates by way of either of the divisions by which Gates can be reached, is greater than the track mileage from the city limits to the utmost extent of the Oak Grove district. Although this is true, Gates is entitled to a ten-cent fare as against a fifteen-cent fare to the Oak Grove group of stations, if we start with the proposition that the railway company was justified in extending the five-cent zone so as to take in the Lents district, for Gates is only 2.19 miles beyond Lents. The distance to Gates by way of Golf Junction and the Springwater division is 2.40 miles greater than by way of Lents and the Mt. Scott division. It would be unreasonable to charge a greater fare to Gates over the Springwater division than over the Mt. Scott division, even though the distance is greater. It is always possible to pick out apparent inconsistencies and discriminatory charges where five-cent zones are adopted, and yet it has been the common practice of street and suburban and interurban railway companies to adopt these five-cent zones and this practice is a reasonable and proper one.

A very interesting and analogous case has been before the Wisconsin Railroad Commission, entitled Gillett vs. Milwaukee, Etc., Ry. Co., 1 Wis. R. R. Com. Rep. 689. The charge against the railway company was that the rate to Wauwatosa outside of the city of Milwaukee was unjustly discriminatory when compared with the rates charged by the railway company to other suburban points. The following is a full quotation from the opinion:

> "The petitioner in support of its claim, that the city of Wauwatosa is being discriminated against, relies on substantially the following facts: The lines of the respondent companies ex-

tend beyond the limits of the city of Milwaukee at eleven different points. As to eight of these points the one-fare limit is placed beyond the city limits. As to three of such points the one-fare limit is placed at the city limits. The Lake Park line, the North Milwaukee line and the Walnut Street line to Wauwatosa, all have their one-fare limit placed at the city limits of Milwaukee. The Whitefish Bay line, the Wells Street line to Wauwatosa, the line to Calvary Cemetery, the National Avenue line, the Greenfield Avenue line, the Muskego Lake line, the Tippecanoe line, and the interurban line to Cudahy and beyond, all have their single-fare limits placed outside of the city of Milwaukee and at varying distances from its boundary lines. From the central point in the city of Milwaukee, from which distances are reckoned, it is claimed by the petitioner, that the distance to the single-fare limit on the Howell Avenue line, to West Allis and to St. Francis, is substantially the same as the distance to Wauwatosa; that the travel between Wauwatosa and Milwaukee is large, and that no substantial reason exists for charging the residents of Wauwatosa two fares where the residents of other portions of the territory beyond the limits of the city of Milwaukee are charged but one fare for substantially the same service. In this connection, it might be mentioned that the Hawley road runs generally north and south and is some distance west of the boundary limits of Milwaukee and that it is used as a single-fare limit on the Wells Street line, the line to Calvary Cemetery and the National Avenue line.

. . . . . .

"The petitioner testified to having made several trips on the Howell Avenue or Tippecanoe line beyond the city limits to the single-fare point, and testified to the number of passengers carried beyond the city limits on the outward trip and to the city limits on the inward trip. Mr. L. B. Gregg testified to the same effect, and each of the witnesses testified that there was more traffic between

Milwaukee and Wauwatosa than there was between the city limits of the city of Milwaukee and the single-fare point on the Tippecanoe line.

. . . . . .

"The petitioner's counsel contends that there is no reason or logic in drawing a line of demarcation between urban and suburban service, as defined by Mr. Beggs; that the boundary lines of the city are mere arbitrary lines, as far as the transportation problem is concerned; that the suburb beyond the city limits is ordinarily as populous as is the part of the city to which it is adjacent and that as to frequency of cars and the frequency of stops, the service afforded the so-called suburban district is distinctly a city service. It was not, however, contended that there might not be a limit beyond which the single fare should not be applied, and the matter of determining where that limit should be placed will be involved in the hearing on the absolute reasonableness of the rate, rather than at the present time.

"Taking the central point in the city of Milwaukee from which distances appear to be reckoned in the time cards, the distance to Wauwatosa is six miles. The distance to the one-fare terminal at West Allis is five and one-fifth miles; to the one-fare terminal at St. Francis five and seven-tenths miles; and to the one-fare terminal on the Howell Avenue line six miles. The reason given for the extension of the single-fare limit on this line has been given heretofore, and is stated to be because of a bonus paid for the extension. The travel between Wauwatosa and Milwaukee would appear to be greater than between Wilwaukee and any of the other single-fare points named, except West Allis, from which point the traffic is exceedingly large. West Allis can be reached on a single fare on but one of the two lines that enter it. If the distance between the city limits and some of the single-fare points beyond those limits is considered, Wauwatosa is as near such limits as are some of the single-fare points alluded to.

. . . . . .

"Considering only conditions as they exist at the present time, it would be difficult to give any good reason why some of the points outside of the city of Milwaukee enjoy a single-fare rate, while Wauwatosa does not. Where such zones extend beyond the limits of Milwaukee, the outer limits must, perhaps, be fixed in a more or less arbitrary manner. Those who live outside the zone will generally have some cause of complaint. Wauwatosa comes close to the dividing line, considering the way in which the boundary lines are now fixed, with perhaps more reasons for including it within the single-fare limit than for excluding it. From the standpoint of unfair competition, there is no unjust discrimination practiced, if there is any discrimination at all. We mean by this, that if the respondents should seek to avoid discrimination by shortening the single-fare limits with which comparison is made, such action would not result in any benefit to the people of Wauwatosa. If they are paying a reasonable rate they are not suffering any injury by reason of the fact that other communities are paying less than a reasonable rate. We do not mean that this is a controlling reason for holding that there is no discrimination in the present case, and neither do we wish to be understood as holding that it is necessary to determine that a rate is unreasonably high, before lowering it on the ground that it is discriminatory. Such is not the law. It is our conclusion in the present case that the evidence is not sufficiently clear to warrant us in now holding that the rate should be lowered because it is discriminatory, in view of the fact that the whole question of the absolute reasonableness of the rates charged by the respondent is coming up for consideration as soon as its property is valued and its books are audited, and the fact determined as to whether or not its rates of charge are unreasonable.

. . . . . .

"One great difficulty with holding that there is a discrimination in the present instance, is the

fact that the rates of street-car lines are made on the zone system instead of on a mileage basis. A passenger is compelled to pay a single fare of four or five cents, depending on whether he uses a ticket or pays cash, if he rides but two blocks. Another may ride eight or ten miles for the same charge. The party who habitually takes a car a half-mile away from his place of business pays the same amount that a party does who may take a car six miles away. If both use the cars during the rush hours in the morning, the chances are that the long-distance passenger will be able to secure a seat, while the short-distance one will not. The short-distance passenger gets less for his money in the matter of travel, and frequently in the matter of service, and still, to say that he is discriminated against, is to say that the zone system is in itself discriminatory. It is not practical in street-car operation to make rates on a mileage basis, and the ordinances under which the street-car lines in the city of Milwaukee are being operated recognizes this fact and establish the zone system."

A fair consideration of all the facts and circumstances above enumerated necessarily leads to the conclusion that the ten-cent fare to Milwaukie and the fifteen-cent fare to the Oak Grove group of stations is not unjustly discriminatory against those localities when compared with the five-cent fare to Lents and the other fares charged by the railway company to points on the Springwater division. The alleged unjust discrimination was the only basis upon which the court sustained the orders. Therefore, if these old rates were not unjustly discriminatory, it necessarily follows that the orders reducing them were arbitrary, unjust and unreasonable and on that account unconstitutional and void.

V.

THE TRANSFER QUESTION.

There still remains to be considered the second ground of the alleged unjust discrimination; that is, the giving of transfer privileges to passengers coming from the Lents district and the refusal to give transfer privileges to passengers coming from Milwaukie and the Oak Grove group of stations. This proposition practically answers itself as soon as we admit that the Lents district was properly incorporated into the five-cent zone. Any passenger paying five cents within the five-cent zone is given the right to transfer to any other car within that zone without paying any additional fare. This principle has always been enforced even in favor of passengers coming from the Oregon City division who pay the five-cent fare on that division in the city of Portland, that is, after they have passed Golf Junction Station, for in that event they are given the right to transfer within the city. In view of these facts no unjust discrimination has been established in the matter of transfers.

VI.

EVEN IF UNJUST DISCRIMINATION HAS BEEN ESTABLISHED, THAT WOULD NOT JUSTIFY THE COMMISSION IN PRESCRIBING CONFISCATORY OR UNREASONABLE RATES.

The Supreme Court of Oregon did not consider whether the rates prescribed by the orders of the Commission gave a reasonable return to the railway company for the services rendered. The court sustained these rates upon the theory that the railway company in agreeing to accept a five-cent fare for carrying passengers to Lents thereby asserted the value of its services for transportation to that point, and that the

value of similar service on the Oregon City division, an equal distance beyond the city boundary lines, must be governed by this same measure. Immediately after stating this conclusion, the court said:

> "As illustrating this principle it is said in Menacho vs. Ward (C. C.), 27 Fed. 529, 532: 'The estimate placed by a party upon the value of his own services of (or) property is always sufficient, against him, to establish the real value; but it has augmented probative force and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.' "

The case of Menacho vs. Ward, supra, is in no sense analogous to the present case. The complainants in that case filed a bill to restrain the defendants from discriminating against complainants by charging higher rates for freight than they charged other shippers. Complainants were merchants in New York City, engaged in commerce between that port and Cuba, and the defendants were proprietors of steamship lines plying between New York and Cuba. Complainant alleged that the defendants announced to New York merchants engaged in the Cuban trade that they must patronize defendants' steamships and if they shipped over other lines they would be subjected to onerous discriminations by the defendants on further shipments that they might desire to send by the defendants' steamships. The court used the following language:

> "Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise, under like conditions, to the same places, than they charge to others, because the complainants refuse to patronize the defendants exclusively, while other shippers do not? The fact that the carrier charges some less than oth-

ers for the same service is merely evidence for the latter, tending to show that he charges them too much; but, when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services of property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.

. . . . . .

"The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively. The question is whether the defendants refuse to carry for the complainants on reasonable terms. The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainants' business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them.

. . . . . .

"The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it will result practically in giving the defendants

> a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious. Ordinarily the remedy against a carrier is at law for damages for a refusal to carry, or to recover the excess of charges paid to obtain the delivery of the goods. The special circumstances in this case indicate that such a remedy would not afford complete and adequate redress, 'as practical and efficient to the ends of justice' as the remedy in equity. Watson vs. Sutherland, 5 Wall. 74.
>
> "The motion for an injunction is granted."

The case presented by the above quotation is very different from the case presented by the record before this court. The suggested analogy is that unjust discrimination has been established and the Commission is justified in prescribing a rate to Milwaukie which does not exceed the rate to Lents. If we assume that unjust discrimination has been established, that fact does not prevent the railway company from objecting to a five-cent rate to Milwaukie on the theory that that rate is too low. It was not suggested in the case from which the foregoing quotation is taken that any of the rates charged by the steamship company were too low. The complainants established that the defendants were unjustly discriminating against them by charging them higher rates than they charged other shippers. The court ordered that the company should cease charging complainants these higher and discriminatory rates and should charge them the same rates as it charged other shippers to the same points. The company did not object to this order on the ground that the lower rates were confiscatory or unreasonable. The position of the company was that the evident discrimination

was justified. On this account this Menacho case has no bearing upon the issue raised here.

In the opinion rendered upon the petition for a re-hearing, the Supreme Court of Oregon cites and relies upon Beale and Wyman on Railroad Rate Regulation, sections 838 and 839. There is nothing in these two sections which conflicts with the position of the railway company. They sustain the proposition that a rate, even though it may be reasonable, may none the less be unlawful on the ground that it is unjustly discriminatory. These sections read as follows:

> "TOPIC B. UNDUE PREFERENCE OF LOCALITIES UNDER STATUTE.
>
> "*Section* 838, *general principles of statutory regulation.*
>
> "But though discrimination between localities is not illegal at common law, it is not infrequently made so by statute; and it is well to examine the question in some detail in order to reach a proper understanding of the statutory provisions. The rule does not forbid all differences between localities, but such only as are undue or unreasonable; for the statutes generally have a saving clause respecting dissimilar conditions and circumstances.
>
> "The general principle may be thus expressed in one brief paragraph. 'It is insisted that these differentials give an undue preference for the reason that they are without excuse or justification. If the assumption of fact embraced in this statement is true, the conclusion probably follows. A preference without legitimate excuse would be in and of itself an undue and unreasonable one.'
>
> "It follows from what has just been said that: 'A disturbance of a settled equality between localities by making for the first time a difference between them is prima facie unreasonable, and should be looked upon with suspicion.'

"*Section* 839. *Reasonableness of rate per se immaterial under statute.*

"Under the provisions of such a statute, the Interstate Commerce Act, for instance, the fact that a rate is per se reasonable does not disprove the charge that it is unlawful. If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive. The right of one locality in that regard is not increased, nor is the equal right of a competing locality diminished, by municipal subscriptions which were advanced for the building of the road."

These sections sustain the position of the court to the effect that a rate, even though it may not be unreasonable, may none the less be unlawful on the ground that it is unjustly discriminatory. This is in accordance with the Oregon statute which prohibits rates which are either unreasonable or unjustly discriminatory. These sections, however, do not justify an order of any commission, prescribing unreasonable and unjust rates in order to eliminate unjust discrimination. A number of the statutes on this subject provide specific remedies in cases of unjust discrimination, such as the payment of damages to the injured party. In actions under these statutes a complainant, after establishing the fact of unjust discrimination, is entitled to enforce the prescribed penalty. An example of this principle is the case of The Board of Trade of Lynchburg vs. Old Dominion Steamship Co., 6 I. C. C. Rep. 632. This was a proceeding instituted under the long-and-short-haul clause of the Interstate Commerce Act. The defendant railroad company had greatly reduced its rates to Knoxville, Tennessee, from New York, Providence and Boston during a particular period. During this same period

the rates to Lynchburg and intermediate locality were not reduced and the rates to that point were in excess of the new low rates to Knoxville. The suit was instituted to recover the excess of rates charged Lynchburg dealers on the ground that these rates were unjustly discriminatory when compared with the rates to Knoxville. Complainant succeeded in establishing the unjust discrimination and thereby became entitled to enforce the penalty which the act prescribed, which was a recovery of the excess. If in this case the complainant had undertaken to force the railroad company to reduce the rates to Lynchburg because of the reduced rates to Knoxville, the railroad company could very properly have defended on the ground that such reduced rates to Lynchburg, if put into force and effect, would be unreasonable and unjust and would not give to the railroad company a fair return upon its capital invested in serving the public.

We have failed to find any case where any commission or other authority has imposed upon a public carrier an unreasonable or confiscatory rate, because any particular rate has been shown to be unjustly discriminatory. If unjust discrimination exists in the rates involved in this case, the Commission has the power to make any appropriate order to eliminate the unjust discrimination. The proper method may be to raise the lower rate rather than to reduce the higher rate. This was suggested in the case of Gillett vs. Milwaukee, Etc., R. R. Co., 1 Wis. R. R. Com. Rep. 689, in the following language:

> "The question as to whether or not a discrimination is being practiced, may often be determined without passing upon the absolute reasonableness of the rates charged. Assuming that a discrimination exists, it is claimed by the petitioner that it is the duty of the Commission to remove the discrimination by reducing the Wauwatosa rate to the level of the rates charged between

points that form the basis of the discrimination. It is the claim of the respondents, on the contrary, that the question of the reasonableness of the rates, in any event, must be determined, and if the Wauwatosa rate is found to be reasonable, and the rates to the points in reference to which discrimination is claimed to exist are found to be unreasonably low, the discrimination should be avoided by raising the unremunerative rates."

The Oregon Supreme Court evidently had this point in mind, for in the opinion upon the rehearing it used the following language:

"Plaintiff justifies the lower charge to and from Lents to the terminus in the city of Portland, first, on the ground that it is prevented from charging each passenger more than five cents fare because of the alleged contract with its predecessor and the former owner of that portion of the road extending between Lents and Hawthorne Avenue. But this arises from the wrongful act of the plaintiff and its predecessor; that is, it had no lawful right or power as was held in the main opinion to thus bind the State or restrict it in its future regulation of fares. On account, however, of the forfeiture clause of this contract, it was doubtless considered by the Commission that to order plaintiff to increase the rate of its fare at Lents in order to avoid the discrimination complained of would cause it to hazard a greater loss than to lower the rate of fare at Milwaukie. It therefore chose the latter and under the circumstances of the case we think it was justified in so doing, inasmuch as the forfeiture clause of the contract expires by limitation on April 30, 1911, after which time plaintiff will be free to act upon its own judgment in the premises and so to arrange its schedule of fares as to avoid any just complaint of discrimination."

It was not proper for the Commission to take into consideration these several matters. Neither the Com-

mission nor the court had any basis for assuming the power to decide for the railway company, whether or not to continue to charge a five-cent fare to Lents in order to avoid the forfeiture under its contract. The Commission could properly require the railway company to eliminate the unjust discrimination, assuming that it existed, but in regulating the company's fares, the Commission is precluded from violating the company's constitutional guarantees. The Commission imposed upon the railway company unjust, unreasonable and arbitrary rates, which are not sufficient to give to the railway company a fair return upon its capital invested in serving the public, and it justifies these rates upon the proposition that the railway company agreed to accept a five-cent rate to Lents, thereby asserting the value of that service, and that it must be governed by the same measure for similar service on the Oregon City division an equal distance beyond the boundaries of the city. It cannot be said that the railway company's Lents contract bestowed upon the Commission a power which it would not otherwise have had, viz., a power to impose upon the railway company rates of fare which are unremunerative and less than reasonable. The Lents contract did not protect the railway company against reasonable rate regulation by the Commission, but on the other hand, it did not give the Commission any reason or excuse for prescribing unreasonable rates.

The question of determining upon and fixing the rates to be substituted for those pronounced unjustly discriminatory should have been determined with due regard to appellant's constitutional rights, to protect which a thorough investigation of all the facts of the case was essential, and it was palpably erroneous for the Supreme Court of Oregon to affirm the action of the Commission in adopting the lowest fare charged by the company on any of its lines as the proper fare

to be charged on the company's other lines for a like distance, without having given any consideration to any of the other facts and circumstances. A carrier may voluntarily adopt rates which a commission has no power to prescribe. This question was considered in Lake Shore & Michigan Southern Railway Co. vs. Smith, 173 U. S. 684. In this case the Michigan Supreme Court held that a statute requiring the sale of one-thousand-mile tickets was a valid and constitutional act. The United States Supreme Court reversed this decision and held the act unconstitutional, using the following language:

> "It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company."

In the case of Southern Railway Company vs. Atlanta Stove Works, 128 Georgia, page 207, 57 S. E. Rep. 429, which involved the validity of an order of the Georgia Commission fixing railroad rates, the court, at page 434, used the following language:

> "When the carrier is forced to meet competition at a given point on its line, of necessity it must adjust its rates within the zone of the competitive point to the competitive rate to that point.

> This condition may be inartificially caused, and the adjustment by the carrier of its rates to such conditions cannot be accepted of itself as a justification for making a schedule of rates based on the voluntary action of the carrier. We recognize the carrier's right to manage its internal affairs by reducing its tariff below the commission rate, and that such low rate affords no basis for an arbitrary reduction of the Commission's maximum standard to the voluntary low rate of the carrier."

In Minneapolis vs. Minneapolis Street Railway Co., 215 U. S. 415, Mr. Justice Day, in delivering the opinion of the court (p. 435), used the following language:

> "Acquiescence in a regulation which may not have been deemed injurious and may have been deemed wise and expedient does not preclude a contest against the enforcement of regulations which are injurious and violative of contract rights."

It seems reasonably clear from the foregoing that the voluntary five-cent rate given by the railway company to the Lents district is no criterion or measure to be adopted by the Commission in prescribing a rate to Milwaukie and no justification to the Commission in forcing upon the railway company an unreasonable, confiscatory or discriminatory rate. The same criticisms apply to the new ten-cent rate to the Oak Grove group of stations.

In the opinion of the Supreme Court of Oregon rendered upon the petition for a re-hearing, the court considered the right of the Commission to direct the railway company to give transfer privileges over other lines to passengers coming from the Oregon City division; in fact, this question was directly presented by counsel for the railway company, on the theory that the lines of railway within the city, over which trans-

fers to certain passengers were given, were not owned by the railway company, but by another separate and distinct company, the Portland Railway Company. The court discussed the two questions involved in the charges of unjust discrimination, to wit, the fares and the giving of transfer privileges, and said:

> "As to the second of these questions, it is now maintained for the first time that the order of the Commission requires plaintiff to furnish such transfers to its passengers traveling from Milwaukie station into Portland, and that, to that extent, the order affects the rights of another corporation not a party to the proceedings, for which reason, if for no other, the order would be void. It is contended that at the time of the hearing before the Commission the plaintiff was the owner and operator of the three lines of railway described in the pleadings; that the Portland Railway Company, another corporation, was the owner of and operated all other street railways in Portland, and that the transfers spoken of in the record secured the privilege of traveling on such other street railways without the payment of additional fares; that if plaintiff were required by order of the Commission to furnish transfers to its passengers from the town of Milwaukie, and required that they be accepted by the owner of the railways to whom they were directed, the effect thereof would be to bind such owner, without it having been permitted to be heard. The Railroad Commission's order in that respect is not a positive command to the plaintiff to give transfers, nor that they be accepted by any one, but the order is, in effect, to cease an unlawful discrimination between the passengers from Lents and those from Milwaukie by desisting from refusing the latter the same transfer privileges as accorded to the former, and that plaintiff should furnish to all persons paying the rates of fare fixed by the Commission in its order the same transfer privileges accorded Lents passengers. The order of the Commission would, therefore, be

complied with by giving such transfers to all, as plaintiff saw fit to continue to give to Lents passengers, or by desisting entirely from its practice of giving transfers to Lents passengers. Which of these two courses is to be taken is left to plaintiff's option. It was not bound in the first place by any mandate of the law, or by any contractual obligation of its predecessor in interest, or of itself, to furnish transfers to Lents passengers. The giving of them was purely voluntary, and a gratuity, which, being refused to its other patrons, constituted an unlawful discrimination. This is within the power of the board to rectify by an order directed to the plaintiff alone."

If we admit the existence of unjust discrimination, it is difficult to find any reasonable objection to the order of the Commission requiring the railway company to give equal transfer privileges to all of its riders. Both on this question of transfers and the question of fares, the orders are objectionable because they are based on alleged unjust discrimination when no such unjust discrimination has been established. On the other hand, even with this admission, the order in regard to the fares is still objectionable, because the Commission, instead of confining itself to directing the railway company to eliminate the unjust discrimination, or to fixing rates with due regard to the railway company's constitutional rights, prescribes fares which are unreasonable, confiscatory and discriminatory.

VII.

THESE ORDERS OF THE COMMISSION ARE CONFISCATORY.

The railway company is entitled to earn a fair return upon the value of its property used in serving the public and any rate prescribed by the legislature

or by the Commission acting under legislative authority, which does not allow it to earn a fair return, deprives it of its property without due process of law and denies to it the equal protection of the laws. This proposition has, of course, been considered in a great many cases and the principles involved have become elementary. The proposition is usually presented in cases where a maximum rate has been prescribed as, for instance, two cents a mile upon a railway line. The same proposition has also been considered where a schedule of rates has been prescribed. The case presented by these orders of the Commission is a little different, for the orders change a very few only of the rates charged by the railway company upon its entire system of railway lines. The railway company had a schedule of rates before the Commission entered the orders, of which the railway company now complains, and these orders may be considered as amending this general schedule.

The railway company presented in its Exhibit No. 16 the earnings and operating expenses of its entire system of railways. This exhibit shows the following:

Operating Statistics all Departments O. W. P. & Ry. Company for Calendar Year 1907.

Total Railway Earnings.		
Passenger	$521,327.69	
Freight	158,006.20	
Mail	4,148.18	$683,482.07
Expenses.		
Passenger	$425,131.59	
Freight	104,524.39	529,655.98
Net Earnings		$153,826.09

The railway company further established by its evidence that it owns and operates 95.53 miles of single track. The value of this line was shown to be $30,000 a mile, making a total value for the 95.53 miles of $2,865,900. This figure does not take into consideration the hydro-electric plant of the railway company or make any provision for the furnishing of electric power for the operation of the railway system. Even on this basis the earnings are less than five and one-half per cent. upon this valuation of $2,865,900. A return of five and one-half per cent. to a railway company in this part of the country upon its investment used in serving the public is not enough. Under these circumstances any reduction of any of the rates by order of the Commission would seem to be unreasonable and any such order open to attack on the ground that it is confiscatory. In making these figures showing the net earnings for the calendar year 1907, amounting to $153,826.09, no allowance was made for depreciation. The testimony shows that a depreciation charge of five per cent. on properties of this kind is a reasonable depreciation charge. If we deduct five per cent. of $2,865,900, that is, $143,295, from the above figure of net earnings, to wit, $153,826.09, it leaves $10,531.09 to represent the return of the railway company upon its investment of $2,865,900, a little more than one-third of one per cent. This was the amount of the return received by the railway company under the old rates. If the rates prescribed by the Commission are to become operative, the earnings of the railway company will be less to the extent of the loss which will naturally follow from the reduction of rates ordered by the Commission.

The railway company undertook to show the amount of the loss of revenue which would result to it, if the rates prescribed by the Commission are allowed to become operative. The railway company's Exhibit

No. 10 shows that the total number of commutation tickets sold by it between Milwaukie and Portland for the year 1907 reduced to a one-way basis was 127,453, and its Exhibit No. 2 shows that the commutation rate between these points was seven cents. If the five-cent rate to Milwaukie goes into effect it will mean a reduction of two cents upon each one of these commutation tickets. This means a loss of $2,549.06. The railway company's Exhibit No. 11 shows that during this same period 60,005 ten-cent fares were collected and 46,146 fifteen-cent fares were collected on this Oregon City division. The testimony shows that there is very little travel between the suburban stations on this division, and it is fair to assume that practically all of these ten-cent fares and fifteen-cent fares represent transportation between the city of Portland and Milwaukie or the Oak Grove group of stations, and further that if the rates prescribed by the Commission become operative these ten-cent fares would become five-cent fares and the fifteen-cent fares would become ten-cent fares, a loss of five cents in each case, which would make a loss on these 106,151 fares of $5,307.55. In the above figure no account has been taken of the commutation tickets between Portland and the Oak Grove group of stations. The railway company's Exhibit No. 10 shows that, during the year 1907, 84,004 of these commutation tickets were sold. It also shows that the commutation rate to the several stations in this Oak Grove group is in every instance less than ten cents; which means that if the cash fare to the Oak Grove group of stations is reduced from fifteen cents to ten cents, it will not necessarily involve a reduction in the commutation rates to these points. The direct effect, therefore, upon the revenues of the railway company from the reduction of fares ordered by the Commission is as follows:

127,453	commutation fares reduced by two cents	$2,549.06
60,005	ten-cent fares reduced to five cents	3,000.25
46,146	fifteen-cent fares reduced to ten cents	2,307.30
		$7,856.31

This figure does not begin to show the loss of revenue which the railway company will suffer if the rates prescribed by the Commission shall become operative. There are a great many stations on the Oregon City division south of the Oak Grove group. There is a group of stations immediately south of the Oak Grove group to which the fare charged by the railway company is twenty cents. Oregon City and Canemah are farther south and the fare to each is twenty-five cents. If the rates prescribed by the Commission become operative, it will necessarily follow that the railway company will be required to reduce its twenty-cent fares to fifteen cents and its twenty-five-cent fares to twenty cents. This question was considered by the Supreme Court of Oregon in its opinion upon the petition for a rehearing. The court said:

> "It is also complained that the reduction of the rate from ten to five cents at Milwaukie and from fifteen to ten cents at Oak Grove will entail upon plaintiff a considerable loss by compelling it to make equivalent reductions along the entire line to Oregon City. We do not think this necessarily follows, but, if it should, we are of the opinion that the consequences contemplated would result from the arbitrary manner by which plaintiff has divided its road into five-cent zones for regulating the amount of its charges, and for these reasons we think it ought not to be heard to complain."

The railway company feels that it should not be subjected to any adverse criticism because of its adop-

tion of the zone system of rates. It is hardly fair to speak of this zone system as an arbitrary manner of dividing a railway line for regulating its charges. It is quite usual for suburban and interurban railway companies to adopt this system and it does not work any injustice to any one. Nor is it quite fair to say that the necessity of making equivalent reductions along the entire line to Oregon City will be due to this zone system. The rates of fare to the several stations along the same line of railway necessarily have an intimate relation to each other. If the fare to the Oak Grove group of stations is to be reduced from fifteen cents to ten cents, it will be absolutely impossible and, in fact, it would be improper for the railway company to continue to charge twenty cents to the group of stations immediately south of this Oak Grove group. The people who live in this twenty-cent group are entitled to a fare which does not exceed the fare to the Oak Grove group by more than five cents. If the fares were not regulated according to the zone system, the fares to stations in the twenty-cent group would have to be correspondingly reduced because of the reduction of the fare to the Oak Grove group of stations from fifteen cents to ten cents, even though the reduction to each of these stations in this twenty-cent group might not be five cents. The principle involved would be the same even if the zone system were not continued.

At the present time a passenger can travel from Oregon City to any one of the stations in the Oak Grove group for ten cents, and if the rate from Portland to the Oak Grove group is reduced to ten cents, it would be useless for the railway company to continue a twenty-five-cent rate from Oregon City. The reason for this is that a passenger coming from Oregon City to Portland would buy a ticket to Oak Grove for ten cents and then buy another ticket from Oak Grove

to Portland for another ten cents, making his entire ride cost him twenty cents. There is no escape from the conclusion that all of the rates on the Oregon City division are necessarily affected by these orders of the Commission.

The railway company's Exhibit No. 17 shows that during the year 1907 there were 682,569 cash fares collected on the Oregon City division. If each one of these fares should be reduced five cents, the loss of revenue to the railway company would amount to $34,128.45. These figures, of course, do not accurately represent the loss of revenue to the railway company, because of the fact that certain of these cash fares must necessarily have been paid for transportation between local stations and between points within the city of Portland, which will not be affected by the orders of the Commission, but the testimony shows there are but few local riders on the Oregon City division and that practically all the fares represent through transportation to or from First and Alder Streets. It is undoubtedly true that the loss of revenue to the railway company from these reduced fares, although it would not amount to as much as $34,128.45, would amount to a very large percentage of that figure. In this figure of $34,128.45 no note is taken of the reduction of two cents in the 127,453 commutation fares between Milwaukie and Portland; this loss, as set forth above, amounting to $2,549.06. It is also reasonable to suppose that if the cash fares between First and Alder Streets and the several points on the Oregon City division are to be reduced five cents, the passengers would expect a reduction in the commutation tickets from points on this division farther south than Milwaukie, and the railway company would feel obliged to make some such reduction, which would mean an additional loss of revenue. If we assume that the anual loss in revenue to the railway company, which will result from these or-

ders would amount to $25,000, the net earnings will be reduced from $153,826.09 to $128,826.09, which is less than four and a half per cent. upon the value of the railway lines, and if a depreciation charge of five per cent. is deducted a deficit will be shown.

In the foregoing discussion no account has been taken of the bonded debt of the Oregon Water Power and Railway Company. It appears from the testimony of Mr. Huggins (Milw. Rec., p. 189, et seq.), that the Portland Railway, Light and Power Company acquired the property of the Oregon Water Power and Railway Company subject to a bonded debt of $4,431,000, which bears interest at the rate of six per cent. and was assumed by the Portland Railway, Light and Power Company. The mortgage securing these bonds constitutes a lien not only on the 95.53 miles of railway of the Oregon Water Power and Railway Company, but also on its water power plant and other property. The total taxes upon the property of the Oregon Water Power and Railway Company for the year 1907 amounted to $37,000, of which $25,241.16 was charged to the railway property. If we divide the bonded debt in the same proportion, it appears that the amount chargeable to the railway lines of the Oregon Water Power and Railway Company amounts to $3,021,942, on which interest at six per cent amounts to $181,316.52. The net earnings of $153,826.09 under the old rates without any allowance for depreciation were not sufficient by over $25,000 to pay the interest on these bonds.

There is another way of looking at this matter which leads to the same conclusion. Under the statutes of the State of Oregon and under its franchises from the city of Portland, the railway company is entitled to charge all of the passengers to Milwaukie and to other points on the Oregon City division five cents for transportation within the city of Portland. The

real force and effect of the five-cent fare to Milwaukie which is prescribed by the order of the Commission entered in the Milwaukie case is to require the railway company to carry passengers from the city boundary lines at Golf Junction to Milwaukie for nothing. If the railway company is entitled to charge these same passengers five cents for transportation from First and Alder Streets to Golf Junction, the result of the five-cent fare to Milwaukie is that the railway company receives nothing for transporting them from Golf Junction to Milwaukie. The same is true when the transportation is the other way, that is, from Milwaukie to First and Alder Streets.

It seems to follow necessarily from all that has been said above that these orders of the Commission are confiscatory and on that account unconstitutional, invalid and void.

VIII.

THESE ORDERS OF THE COMMISSION ARE UNREASONABLE, ARBITRARY AND UNJUST.

The question whether a rate is a reasonable one or arbitrary and unjust is a question for judicial consideration. In Chicago, Milwaukee & St. Paul R. R. Co. vs. State of Minnesota, 134 U. S. 418, the court said:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus in substance and effect of

the property itself, without due process of law and in violation of the Constitution of the United States."

To the same effect are the following:

Chicago, &c., R. R. Co. vs. Wellman, 143 U. S. 339;
St. Louis, &c. R. R. Co. vs. Gill, 156 U. S. 648;
Smyth vs. Ames, 169 U. S. 469.

There has never been any proper judicial investigation into the reasonableness of the rates prescribed by these orders of the Commission. The Supreme Court of Oregon has upheld the Commission's orders solely upon the basis that the rates prescribed by the orders were justified by the voluntary rates adopted by the railway company for the Lents and other districts. The court should not have adopted these voluntary rates as any measure of proper rates for Milwaukie and the Oak Grove group of stations. The several rates should have been considered with reference to the particular facts and circumstances surrounding transportation to each point.

We believe we have established the fact that the old rates were not unjustly discriminatory. If that is true, the orders reducing them, based as has been shown, upon the alleged unjust discrimination, must necessarily be unreasonable, arbitrary and unjust and, therefore, unconstitutional, invalid and void. If, however, we admit for the purposes of the argument that unjust discrimination has been established, that admitted fact would not justify these orders, provided the railway company can show that, independent of any question of unjust discrimination, the rates prescribed by the orders are confiscatory, unreasonable, arbitrary or unjust.

We have just considered the question whether these orders are confiscatory and we have considered them separately from that standpoint because of the fact that rate regulations which do not allow public carriers to earn a fair and proper return upon the value of their property invested in serving the public have been so frequently attacked on this ground. As part of this particular question attention is called to the suggestion made above in considering whether these rates are confiscatory or not, to wit, that, as the necessary result of the orders, the railway company is required to carry a great many passengers between the city line at Golf Junction and Milwaukie for no compensation whatever. Any order which has this effect must necessarily be unreasonable, arbitrary and unjust.

These orders are open to attack, not only because of their confiscatory character, but also because for other reasons they are unreasonable, arbitrary and unjust. This conclusion necessarily follows from the findings of fact both in the Milwaukie case and in the Oak Grove case (Findings of fact of Circ. Ct., Milw. Rec., p. 37, Oak Grove Rec., p. 35; adopted by Sup. Ct., Milw. Rec., p. 253, Oak Grove Rec., p. 166), to the effect that the old rates which were reduced by the Commission's orders were reasonable rates. The orders of the Commission cut the Milwaukie rate in half and reduced the old fifteen-cent rates to the Oak Grove group of stations to ten cents. If these old rates were reasonable rates, the orders of the Commission reducing them fifty per cent. and thirty-three and one-third per cent. respectively, were unreasonable orders. The reduced rates cannot be justified by comparison with the rate to Lents or the rate to any other point. They are unreasonable, arbitrary and unjust upon the face of the record, for if a ten-cent rate to a particular point is a reasonable rate, a five-cent rate to the same

point must be an unreasonable rate and, likewise, if a fifteen-cent rate is a reasonable rate to a certain point, a ten-cent rate to that same point must necessarily be an unreasonable rate.

The rates prescribed by these orders discriminate against the people living at points on the Oregon City division farther south than the Oak Grove group of stations. All of the rates on the Oregon City division are so intimately connected with each other that it is arbitrary, unreasonable and unjust for the Railroad Commission to reduce the rates to Milwaukie and the Oak Grove group of stations without making some corresponding provision in regard to the rates to be charged to passengers traveling from and to other stations on this same division. If the Railroad Commission desired to correct the rates to Milwaukie and to the Oak Grove group of stations, on the ground that they were unjustly discriminatory, the Commission should have considered the rates to all of the stations on the Oregon City division and should have put into force and effect a complete schedule of rates for that division, as it was authorized and entitled to do under the provisions of the act of 1907. This partial regulation of rates on this division is unreasonable and discriminates against the people living at the stations farther south than the Oak Grove group.

The rates prescribed by these orders of the Commission also discriminate against people living on other divisions of the railway company's system equally distant from First and Alder Streets or from the city boundary line. The reasonable and proper manner for the Railroad Commission to regulate the rates of fare of the railway company is to consider the schedule of rates as a whole and to adjust them with proper reference to each other. Any partial regulation in the way of prescribing rates for a few of the stations without taking into consideration the rates to

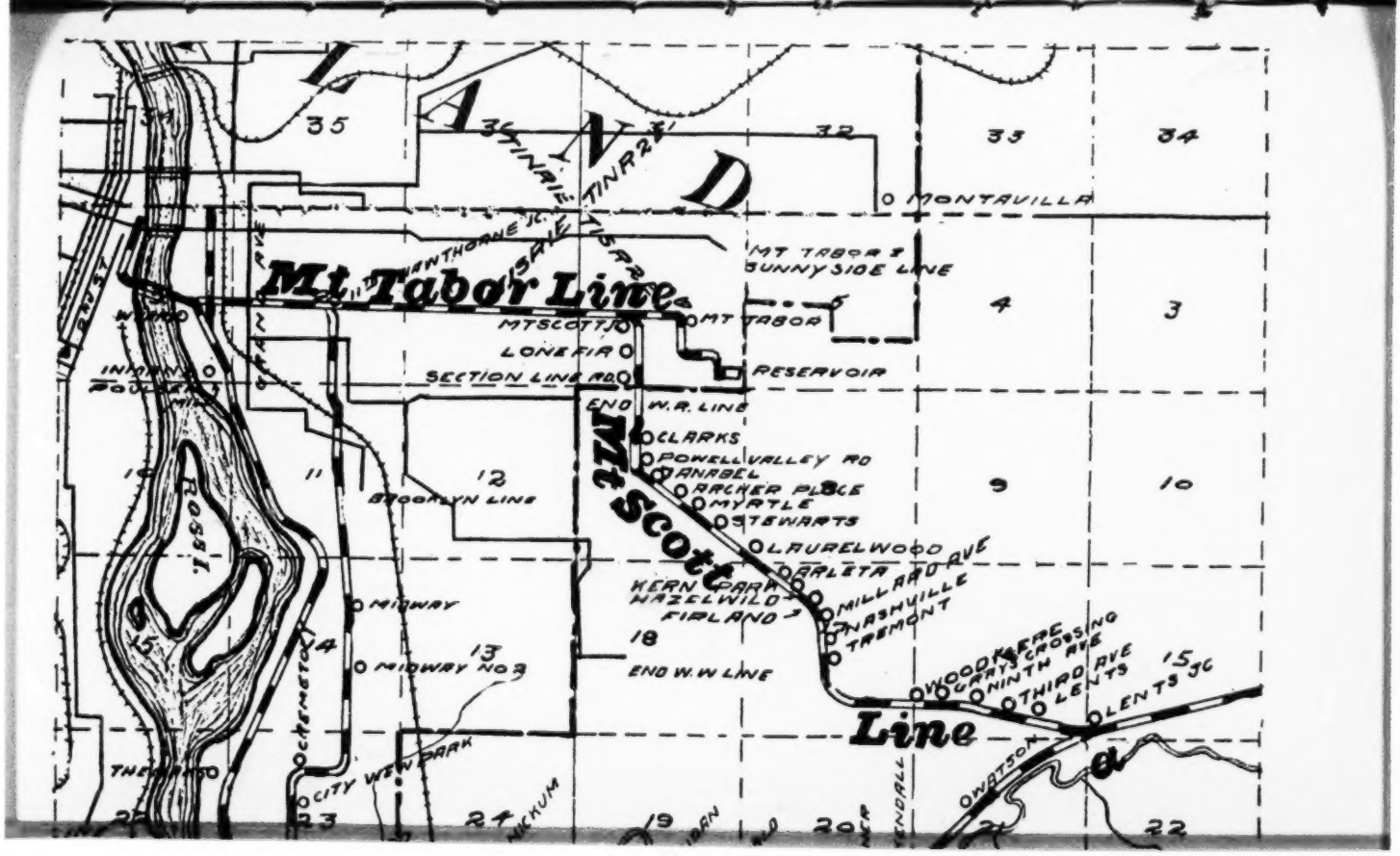
other stations, not only on the same division, but on all of the divisions of the system, necessarily requires the railway company to discriminate against some of its patrons. Any such partial rate regulation must necessarily be unreasonable, arbitrary, unjust and discriminatory.

The rates prescribed by these orders of the Commission are also discriminatory when considered in relation to the rates charged by other railroad and railway companies operating in the neighborhood. The following is a schedule showing the charges per mile which these orders of the Commission require the railway company to put into force and effect for transportation to Milwaukie and the Oak Grove group of stations:

Portland	to Milwaukie	6.71	miles	$0.007½
"	Milwaukie Heights	7.7	"	.013
"	Oak Grove	8.48	"	.012
"	Center	8.68	"	.011½
"	Risley	9.26	"	.011

The railway company's Exhibit No. 4 shows the rates of fare on the Oregon Electric Railway Company system and shows that that company charges on an average three cents a mile. This Oregon Electric Railway Company operates in very much the same manner as the railway company and in very similar territory.

The railway company's Exhibit No. 9 shows the rates of fare on the Southern Pacific Railroad Company, the Oregon Railroad and Navigation Company and the Northern Pacific Railroad Company. All of these companies charge three cents a mile. The railway company's Exhibit No. 6 shows that the rates on the Carvallis and Eastern Railroad Company are four cents a mile and the same is true on the Seaside branch of the Astoria and Columbia River (railway company's Exhibit No. 6). The fare on the Southern Pacific


LAND
Mt. Tabor Line
Mt Scott Line
MONTAVILLA
MT TABOR & SUNNYSIDE LINE
MT TABOR
MT SCOTT JC
LONE FIR
RESERVOIR
SECTION LINE RD
END W.R. LINE
CLARKS
POWELL VALLEY RD
ANABEL
ARCHER PLACE
MYRTLE
STEWARTS
LAURELWOOD
ARLETA
KERN PARK
HAZELWILD
FIRLAND
MILLARD AVE
NASHVILLE
TREMONT
WOODSTOCK
BURRYS CROSSING
NINTH AVE
THIRD AVE
LENTS
LENTS JC
END W.W LINE
MIDWAY
MIDWAY NO 3
BROOKLYN LINE
CHEHALEM
CITY VIEW PARK
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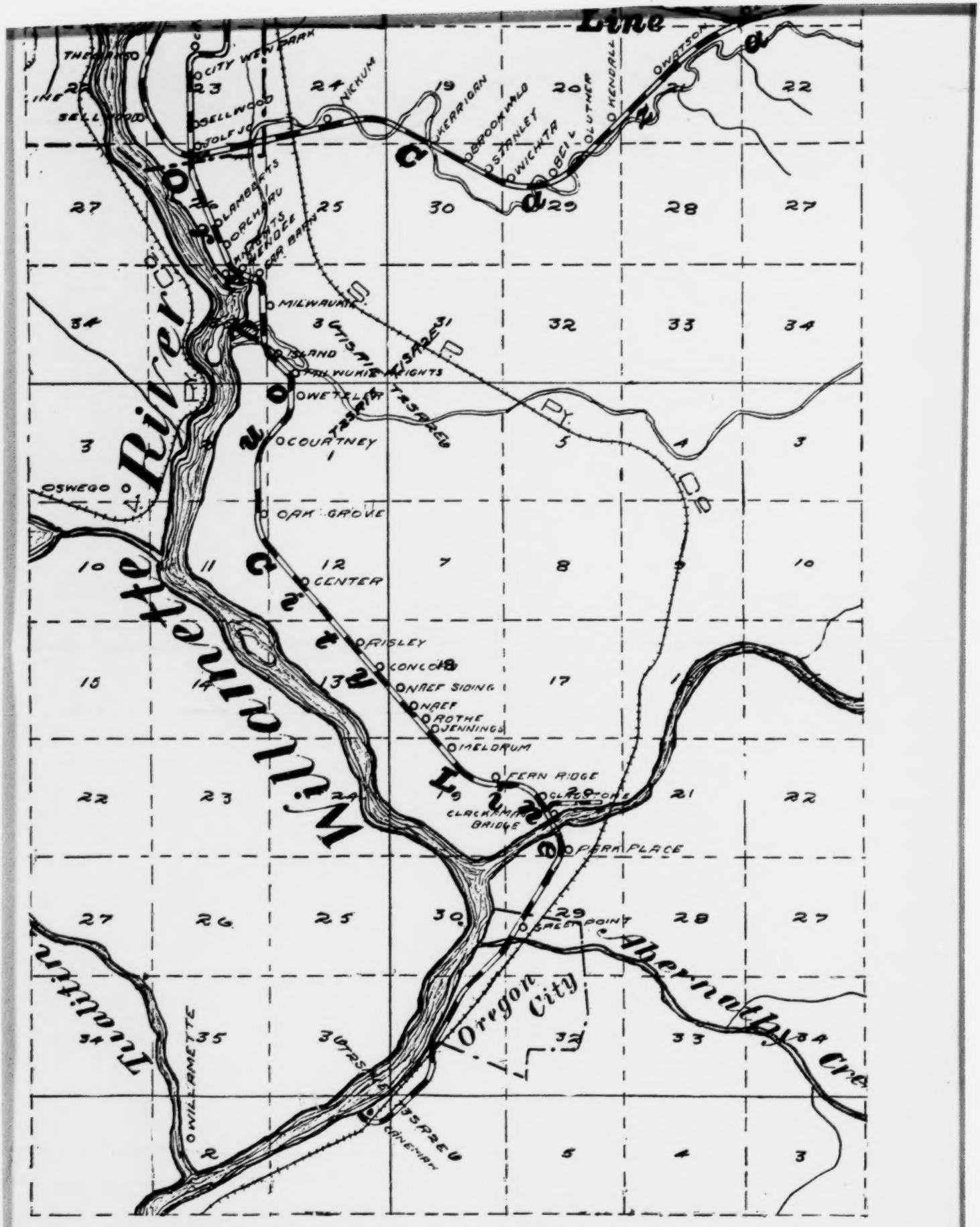

Part of Map of Railway Company's Lines Showing Points in Question.

road from Portland to Milwaukie is twenty-five cents. The distance is about the same as on the line of the railway company, where the old rate is ten cents and the rate prescribed by the Commission is five cents. The fare to Oregon City on the Southern Pacific line is fifty cents against the railway company's charge of twenty-five cents.

Any order of the Railroad Commission which requires a public carrier to discriminate against any of its patrons and any order which requires a public carrier to charge its passengers less than other public carriers are allowed to charge their passengers, where the transportation upon the several lines is carried on under substantially similar circumstances and conditions is unreasonable, arbitrary and unjust. In speaking of a similar situation in the case of Atlantic Coast Line R. R. Co. vs. North Carolina Corporation Commission, 206 U. S. 1, Chief Justice White (then Mr. Justice White) said:

> "Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate, when the result of the enforcement of such order would be to compel a carrier to serve for a wholly inadequate compensation a class or classes selected for legislative favor, even if considering rates as a whole a reasonable return from the operation of its road might be received by the carrier."

In Lake Shore & M. S. R. R. Co. vs. Smith, 173 U. S. 684, a statute was under consideration which required all railroad companies operating within the state to sell at their principal ticket offices one-thousand-mile tickets at a specified reduced rate. The court held that this statute was discriminatory, unconstitutional and void. Mr. Justice Peckham said:

"The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public.

. . . . . .

"If this power exist it must include the right of the legislature, after establishing maximum freight rates, to also direct the company to charge less for carrying freight where the party offering it sends a certain amount, and to carry it at that rate for the next two or five or ten years. Is that an exercise of the power to establish maximum freight rates? Is it a valid exercise of the power to regulate the affairs of a corporation? The legislature would thus permit not only discrimination in favor of the larger freighter as against the smaller one, but it would compel it. If the general power exist, then the legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place.

. . . . . .

"The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither

necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power."

IX.

CONCLUSION.

Alleged unjust discrimination lies at the basis of this controversy. It formed the real basis for the petitions filed with the Railroad Commission, in pursuance of which these orders were entered. It constituted the basis upon which the Commission acted in entering these orders. It was the reason for the refusal of the Circuit Court of Marion County to set the orders aside and the Supreme Court of the State of Oregon planted itself upon unjust discrimination as the basis for its decision. For these reasons we have discussed very fully the question whether any unjust discrimination is shown by the testimony taken in those cases. We believe that we have established the following propositions:

First.—That the existence of unjust discrimination is a question to be determined by judicial inquiry upon consideration of all the facts and circumstances;

Second.—That there has been no such judicial inquiry in this case, the court refusing to consider all of the facts and circumstances and basing its decision upon track mileage alone;

Third.—When all the facts and circumstances are given proper consideration no unjust discrimination has been shown to exist;

Fourth.—In the absence of unjust discrimination the orders are unreasonable, arbitrary and unjust and, therefore, unconstitutional, invalid and void.

We further considered the case upon the supposition that unjust discrimination has been shown to exist and upon that basis we believe we have further established the following propositions, to wit:

Fifth.—The existence of unjust discrimination is no excuse for the imposition of confiscatory, unreasonable, arbitrary, unjust or discriminatory rates;

Sixth.—The rates prescribed by these orders of the Commission are confiscatory;

Seventh.—The rates prescribed by these orders of the Commission are unreasonable, discriminatory, arbitrary and unjust.

We respectfully submit that the railway company is entitled to have these orders of the Railroad Commission of Oregon set aside and annulled on the ground that they are unconstitutional, invalid and void in that they deprive it of its property without due process of law and deny to it the equal protection of the laws.

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IN THE

Supreme Court of the United States.

October Term, 1912. No. 119.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,
Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1912. No. 120.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,
Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In the brief filed for the defendant in error several questions are discussed, to which the plaintiff in error desires to submit a reply, and particularly to the point set forth in the defendant in error's brief in the following heading, to wit:

"I.

"DEFENDANT IN ERROR CONTENDS THAT NO FEDERAL QUESTION WAS RAISED BY THE PLEADINGS, NOR NECESSARY TO THE DECISION, IN EITHER CASE INVOLVED IN THESE PROCEEDINGS, AND THEREFORE THIS COURT HAS NOT JURISDICTION TO REVIEW THE DECISIONS OF THE STATE COURT IN SAID CASES OR EITHER OF THEM, AND THE SAME SHOULD BE DISMISSED."

Under this heading the defendant in error argues that the plaintiff in error did not attempt to raise a Federal question until it filed its motion for a re-hearing in the Supreme Court of the State of Oregon, and that it was then too late to inject a Federal question into these cases. The decision on the petition for a re-hearing, the defendant in error contends expresses no more than would be implied by a simple denial of the motion.

ARGUMENT.

Since the two cases embraced in this proceeding involved the same question, they are, by the leave of the court, presented together and argued as one case. They were heard together and argued as one case in the Supreme Court of Oregon and accordingly but one petition for a re-hearing was filed with that court which by the caption and introductory paragraph thereof was expressly made applicable to both cases. (Milw. Rec., p. 254). We therefore deny the statement which appears on page 14 of the defendant in error's brief to the effect that no formal petition for a re-hearing was filed in the Oak Grove case. That the Supreme Court of Oregon considered the petition applied to both cases is conclusively shown by the opinion of the Supreme Court of Oregon denying the petition, from which we quote as follows:

> "It is also complained that the reduction of the rate from ten to five cents at Milwaukie and from fifteen to ten cents at Oak Grove will entail upon plaintiff a considerable loss by compelling it to make equivalent reductions along the entire line to Oregon City."

Federal Questions Were Presented in Bill of Complaint.

The plaintiff in error does not admit that no Federal question was raised by the pleadings, but, on the contrary, Federal questions were raised by the bills of complaint in both cases, were considered by the Oregon courts and have been in the case from the very beginning. The bill of complaint in the Milwaukie case contains the following:

> "XXIII.
>
> "That the distance on said 'Oregon City division' between said Golf Junction and said town of

Milwaukie is 1.35 miles and that in and by the said order of the said defendant, plaintiff is required and commanded to transport persons traveling as passengers over said 1.35 miles of plaintiff's said railroad for no compensation whatsoever, which action of said defendant this plaintiff alleges to be unjust, unreasonable and unlawful and not within the power of said defendant under the terms and provisions of said chapter 53 of the General Laws of Oregon, Session 1907.

"XXIV.

"That the rates, fares and charges to be charged and collected by this plaintiff for the transportation of passengers between the points described in the said order of the defendant, fixed in said order, are unreasonable and unlawful and that if permitted to go into effect would deprive plaintiff of a just and reasonable or any net profit or return upon the transportation of passengers traveling over the portions of said plaintiff's railroad affected by said order of said defendant, and that the regulations and practice prescribed and fixed in said order of said defendant to be followed and observed by this plaintiff, are and each of them are unreasonable.

"XXVI.

"That to permit the said order and decision of the said defendant to go into effect would unjustly and seriously impair the revenues of this plaintiff and would result in great and irreparable damage and injury to this plaintiff."

Paragraphs XXIII and XXV of the bill of complaint in the Oak Grove case are identical with Paragraphs XXIV and XXVI of the bill of complaint in the Milwaukie case. These paragraphs quoted from the bill of complaint clearly set forth questions arising under the Constitution of the United States. The matter of the sufficiency of the rates and the reasonableness of the orders was argued at length before the

Supreme Court of Oregon and a large part of the brief for the plaintiff and appellant in that case is devoted to a discussion of these questions.

Federal Questions Were Passed Upon by Supreme Court of Oregon in its Original Opinion.

The Supreme Court of Oregon in its original opinion in the Milwaukie case referred to these Federal questions in the following language:

> "The cost of constructing and maintaining a portion of a railway, and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based on particular divisions of the road, but upon the entire system.
>
> "Quite an array of figures are set forth in the brief of plaintiff's counsel, and facts are stated therein in support of the contention that the rate of transportation and the privileges prescribed in the order and decree complained of will not furnish a reasonable return upon the capital invested, and that the maintenance of the existing fares is necessary to supply such recompense, that neither the defendant nor the court can speculate as to the probable effect upon the plaintiff's business or upon the consequences of any change in the population or in the value of property in the affected district, and that, if any reduction is proper, an arbitrary diminution of fifty per cent. as to Milwaukie is excessive, unjust and unreasonable. We do not think it necessary to discuss either of these questions; for the plaintiff, having agreed to accept a fare of five cents for carrying passengers between Portland and Lents, thereby asserted the value of the employment so rendered, by which measure it must be governed for similar service on the Oregon City division an equal distance beyond the boundaries of the city of Portland."

Federal Question First Presented in Petition for Rehearing and Passed Upon Gives Jurisdiction.

Even supposing that the Federal questions had not been presented prior to the filing of the petition for a re-hearing, they were clearly and specifically raised in that petition and were passed upon by the Supreme Court of Oregon in its opinion delivered upon rehearing, as will be shown at a later point in this brief, and under the decisions of the Supreme Court of the United States this is sufficient to give jurisdiction on writ of error. This is settled by a long line of cases, a few of which will be briefly referred to.

In Mallett vs. N. C., 181 U. S. 589, which reviewed a decision of the Supreme Court of North Carolina reversing a judgment in a criminal case, Mr. Justice Shiras, in delivering the opinion of the court, said (p. 592):

> "Before considering the errors assigned by the plaintiffs in error to the judgment of the Supreme Court of North Carolina, it is proper that we should dispose of the motion made by the counsel for the State to dismiss the writ of error, on the alleged ground that the record does not disclose that any Federal question was raised in either of the courts in which the case was heard, and that no such question was raised.
>
> . . . . . .
>
> "But we are of opinion that questions arising under the Constitution and laws of the United States were presented in the Supreme Court of the State, and were by that court considered and decided against the party invoking their protection.
>
> "It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under State laws. But the record discloses that, after that opinion

had been filed, but before it had been certified down, the defendants filed a petition for re-argument, and presented the Federal questions on which they rely. The Supreme Court entertained the petition, and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss, numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a re-hearing in the Supreme Court of a State after that court has pronounced its final decision. Loeber vs. Schroeder, 149 U. S. 580, 37 L. Ed. 856, 13 Sup. Ct. Rep. 934; Sayward vs. Denny, 158 U. S. 183, 39 L. Ed. 942, 15 Sup. Ct. Rep. 768; Pim vs. St. Louis, 165 U. S. 273, 41 L. Ed. 714, 17 Sup. Ct. Rep. 322.

"But those were cases in which the Supreme Court of the State refused the petition for a re-hearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. State vs. Mallett, 125 N. C. 718, 34 S. E. 651. Had that court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action."

One of the Federal questions dealt with by the State Supreme Court in the Mallett case was that the statute in question was *ex post facto* and in violation of article 1, section 10, of the Constitution of the United States, and in considering that question this court continued, and quoted the opinion of the State court, as follows (p. 593):

"The opinion of the Supreme Court stating the facts and disposing of this question is brief, and may be properly quoted:

> "'The next exception in the petition is that at the time of the commission of the offense the statute allowed no appeal to the State from the ruling of the Superior Court judge. But the defendants had no "vested rights" in the remedies and methods of procedure in trials for crime. They cannot be said to have committed this crime relying upon the fact that there was no appeal given the State in such cases. If they had considered that matter they must have known that the State had as much power to amend section 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the State from these intermediate courts. At any rate, their complaint is of errors in the trial court, and when they appealed to the Superior Court they did so by virtue of an act which provided that the rulings of that court upon their case could be reviewed, at the instance of the State, in a still higher court. The appeal was certified up to the Superior Court April 1, 1899, and on July 7, 1899, the appeal was taken to this court. The statute regulating appeals from the eastern district criminal court (chapter 471, Laws 1899) was ratified March 6, 1899.'"

The second contention of plaintiffs in error in the Mallett case involving a question dealt with by the State Supreme Court as a Federal question was, in the words of this court (pp. 597, 598):

> "that the plaintiffs in error were denied the equal protection of the laws because the State was allowed an appeal from the Superior Court of the Eastern, and not from the Western, District of the State."

The opinion of the Supreme Court briefly disposing of this question was as follows (125 N. C. 718, 34 S. E. 651):

"The petition further urges that it is a discrimination, because the act creating the Western District criminal court fails to give the State the right of appeal. We do not see how such omission injures the defendants. The State has control of its own legislation, as to the cases in which it will permit appeals in its own behalf in its courts. Hurtado vs. California, 110 U. S. 516, 28 L. Ed. 232."

In Illinois Central R. R. Co. of the State of Illinois vs. Com. of Kentucky, 218 U. S. 551, Mr. Justice Hughes, in delivering the opinion of the court, said (pp. 555, 556):

"The Commonwealth of Kentucky recovered judgment in this suit against the Illinois Central Railroad Company, for the amount of the tax, for the year 1897, upon the franchise formerly belonging to the Chesapeake, Ohio & Southwestern Railroad Company. The recovery was based upon the fact that the Illinois Central Railroad Company was, at the time to which the tax related, in possession of the railroad, and was operating it under a power of attorney from the purchaser at a judicial sale, and had made the report which was required by the statute relating to the taxation of franchises. The judgment was affirmed by the Court of Appeals of Kentucky, 128 Ky. 268, 108 S. W. 245. The Illinois Central Company petitioned for a re-hearing, and presented the Federal questions now urged under the Fourteenth Amendment of the Constitution of the United States. The court entertained the petition and extended its opinion, holding that no right of the appellant under the Fourteenth Amendment had been violated by the decision. Thereupon this writ of error was brought, and, as the State court passed upon the Federal questions, this court has jurisdiction. Mallett vs. North Carolina, 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Leigh vs. Green, 193 U. S. 85, 48 L. Ed. 626, 24 Sup. Ct. Rep. 390."

In the above case the Court of Appeals of Kentucky dismissed the questions raised under the Constitution of the United States very briefly. The following is all of the opinion delivered on re-hearing in that case:

> "Hobson, J.: No right of appellant under the Fourteenth Amendment to the Constitution of the United States is violated by the decision. As shown by the opinions of the court cited in the opinion herein, taxes have been imposed based on the assessments in controversy. All other taxpayers than railroads were taxed, and, if some railroads escaped, it is no reason that others should go free while all taxpayers of other classes paid their taxes. If any railroads escaped, they are still liable for their taxes unless barred by limitation. When the board made an assessment and sent out the preliminary and the final notices as provided by the statute that the assessment had been made, its action was final and the legal effect of its action must depend on what they did, and not on the secret intentions of the auditor.
>
> "The petition for re-hearing is overruled, but the opinion is extended as above indicated."

In Kentucky Union Co. vs. Com. of Kentucky, 219 U. S. 139, brought to this court upon writs of error to the Court of Appeals of the State of Kentucky, and involving the constitutionality of an act of the legislature of the State, Mr. Justice Day, in delivering the opinion of the court, said (p. 158):

> "No mention appears to have been made of the Federal Constitution in this connection until petition for a re-hearing, when it was objected that the statute, in providing for the sale of the forfeited title, furnished no means of identification or description of the land to be sold, nor for such an ascertainment of the holdings of occupying claimants as would enable a purchaser to know what was being offered for sale; and it was urged that a judicial sale in pursuance of such a proceeding

would be no less than a sacrifice of the defendant's property, and that such an order would violate the due process of law secured by the Constitution.

"In the opinion upon the petition for a rehearing, the Court of Appeals announced that it found nothing in the statute which deprived the owner of due process of law within the meaning of the Fourteenth Amendment. The court having thus considered the Federal question, the objection is open here."

See also

Forbes et al. vs. State Council of Va., etc., 216 U. S. 396;

McCorquodale vs. State of Texas, 211 U. S. 432;

The defendant in error on page 16 of its brief cites the case of Fullerton vs. Texas, 196 U. S. 192, as authority for the proposition that the certificate of the judge of the State Supreme Court that a Federal question was decided is not sufficient to give the Supreme Court of the United States jurisdiction. This point decided in that case has no bearing on the case before the court because in the Fullerton case the record showed that no Federal question had been passed upon by the Supreme Court of the State. The distinction between that case and the case now before this court was well brought out by the paragraph of the opinion in the Fullerton case which immediately precedes the language of that opinion quoted by the defendant in error. The paragraph referred to reads as follows:

"We have repeatedly ruled that it is too late to raise a Federal question by a petition for rehearing in the Supreme Court of a State after that court has pronounced its final decision, although, if the State court entertains the petition, and disposes of the Federal question, that will be sufficient. Mallett vs. North Carolina, 181 U. S. 589,

45 L. Ed. 1015, 21 Sup. Ct. Rep. 730. In that case it was observed: 'Had that court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action.' ''

Federal Questions Were Raised in Petition for Rehearing.

That the railway company in its petition for a rehearing presented to the Supreme Court of the State of Oregon the Federal questions arising under the Fourteenth Amendment of the Constitution of the United States now presented to this Court may be shown best by quoting in part from the petition, wherein the railway company urged as the grounds thereof the following (Milw. Rec., Case 119, p. 254):

> "That the order of the respondent in this cause made under and pursuant to the provisions of the said chapter 53 of the General Laws of Oregon for the year 1907 is in conflict with section 1 of the Fourteenth Amendment of the Constitution of the United States in that the enforcement of the said order of respondent would deprive this appellant of its property without due process of law and would deny this appellant the equal protection of the laws.
>
> . . . . . .
>
> "*The Railroad Commission Act, the orders of the Commission and the decisions of the court are in violation of section 1 of Article XIV of the Constitution of the United States prohibiting any State from depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.*
>
> . . . . . .
>
> "In determining the question of unjust discrimination, the court has held in effect, that only the circumstances of relative mileage from the corporate limits of the city of Portland need be con-

sidered by the Commission. If such be the effect of the Railroad Commission Act, then we submit that such provision of the law is repugnant to the Fourteenth Amendment of the Constitution of the United States insuring to all persons the equal protection of the laws.

"Appellant has invested its money, has constructed its railways and is engaged in operating them as a common carrier and depending upon the law to permit it to receive a reasonable compensation for the services rendered by it to the public. The equal protection of the law comprehends that the appellant shall be permitted to enjoy a reasonable compensation for the services rendered by it to the public and it can be deprived of this right to a reasonable compensation only as a consequence of its wrongful act depriving it of its right to invoke the protection of the organic law.

"The legislature of the State is without power to enact any law that will in its operation deny any person the equal protection of the laws or authorize the taking of the property of any person without due process of law. Under the construction of the Railroad Commission Act by this court the appellant is required to operate its railway and provide its service to the public traveling thereon at an admitted loss without having been shown to be guilty of a wrongful act which would operate to deprive it of its constitutional right to equal protection.

"It was said by the Supreme Court of the United States in the case of Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362-410:

> " 'The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain.'

"The decision of the court is in effect that at the time of trial Lents was 3.50 miles outside of the corporate limits of the city of Portland and that appellant having established a five-cent fare between Portland and Lents should be held to a limit of five cents for the transportation of pas-

sengers on any other lines of its railway extending 3.50 miles, or less, beyond the corporate limits of the city. If the Railroad Commission Act had contained an express provision to this effect, we apprehend that such provision could not be enforced if it were shown that the carriage of passengers to points 3½ miles beyond the city boundaries in any direction for a fare of five cents was impossible of performance by reason of the cost of such service in most of such instances being greater than the rate allowed by law.

"Under the construction of the Railroad Commission Act by this court, this appellant is deprived of the right to construct and operate any lines of railway outside of the corporate limits of the city of Portland, a distance of 3.50 miles, or less, except upon condition that this appellant shall establish upon such lines a uniform fare of five cents. Such rule, however, under the decision of this court, would not apply to any other railway company constructing or operating such lines of railway from points within to points without the corporate limits of the city of Portland, and would leave such other railway companies free to charge a reasonable compensation for the services to be rendered by them. This is the logical effect of the rule announced by this court limiting the consideration of the respondent to relative mileage and operates to deny to this appellant the equal right with others to reasonable compensation for its services.

. . . . . .

"Notwithstanding the provisions of section 59, quoted by this court as authorizing the consideration of discriminations between localities which was not expressly conferred by the terms of the act, the court has seen fit to apply a limited and restricted construction to the term 'like and contemporaneous service' so as to deprive the appellant of due consideration of all of those circumstances and conditions naturally and usually entering into the making of rates. Thus, the court has refused to consider as justifying any differ-

ence in fares between Lents and Nickum on the one hand and Milwaukie on the other, the points raised in appellant's brief and established by the evidence in this case as follows:

I.

"That the cost of constructing the Mount Scott division was fifty per cent. less per mile than the cost of constructing that portion of the Oregon City division between Milwaukie and First and Alder Streets, thereby rendering a smaller investment necessary to handle the traffic on the Mount Scott division than on the Oregon City division.

II.

"That on the Mount Scott division the line runs through a thickly settled portion of the city of Portland for fifty-six blocks and cares for local business within the city limits, while on the Oregon City division there is no local business worth mentioning upon the 5.36 miles of the Oregon City division from Golf Links to First and Alder Streets.

III.

"That the Mount Scott division is practically a city line having all the advantages of short riders and that a great majority of the passengers on the Mount Scott division do not actually ride more than one-half of the entire distance possible to ride thereon for five cents, while on the Oregon City division ninety to ninety-five per cent. of all passengers between Portland and Milwaukie ride the entire distance between the terminal at First and Alder Streets and the town of Milwaukie.

IV.

"That a very small portion of the traffic on the Mount Scott division arises at the distance limit of the five-cent fare and that ninety per cent. of the traffic on the Mount Scott division originates at points nearer the said terminal at First and Alder Streets than the five-cent limit at Lents, while on the Oregon City division practically no

traffic arises at any point nearer than Milwaukie to said terminal at First and Alder Streets, and that outward bound travel on said Oregon City division is practically all to and beyond Milwaukie.

V.

"That the volume of travel on the Oregon City division between Milwaukie and all points north of Milwaukie is less than one-twentieth of the number of passengers carried by appellant upon its Mount Scott division.

. . . . . .

"A failure or refusal to consider all of the dissimilar circumstances and conditions which may render a preference in one instance reasonable and in another unreasonable, deprives the appellant of the right to have determined the character of its act alleged to be wrongful and without the establishment of such act as wrongful, it cannot be deprived of equal protection of the laws.

. . . . . .

"The Commission in this case has made a rule extending the five-cent fare to a point beyond that fixed by general law and applicable only to a particular point. The rule is not general in its application to all railway companies and in itself constitutes a discrimination against this appellant which is in violation of the Federal Constitution insuring the equal protection of the laws.

. . . . . .

"The Supreme Court of the United States in the case of Lake Shore & M. S. R. Co. vs. Smith, 173 U. S., page 697, said:

> "'What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely

as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company.'

"The provision insuring to all persons the equal protection of the laws is violated by any statute or act of a commission acting for the legislature which does not make the rule uniformly applicable to all persons under similar circumstances and conditions. Tinsley vs. Anderson, 171 U. S. 101-106.

. . . . . .
. . . . . .

The Rates Established by the Commission are Confiscatory.

"The record discloses that for the year 1907 the net earnings from operation of appellant's railroad, amounted to $153,826.09, and that the fixed charges, interest on $3,000,000.00, representing the actual cost of appellant's railroad, amounted to $180,000.00, leaving a deficit of more than $26,000.00 to which should be added a reasonable amount for depreciation of the railroad and equipment, and it has been shown that the depreciation of electrical railway equipment is very considerable.

"It is claimed by the respondent that the effect of the enforcement of the reduced rates of fare to Milwaukie and the Oak Grove group of stations, would reduce appellant's earnings by not more than $7500.00 per annum, but in this computation the respondent has wholly disregarded the effect of said reduced fares upon the great bulk of traffic on appellant's Oregon City division. The court will remember that Milwaukie and the Oak Grove group of stations are along the line of railway extending from Portland to Oregon City and known as the Oregon City division. The volume of travel between Portland and Milwaukie and be-

tween Portland and Oak Grove is insignificant when compared with traffic of the entire division. Under the present system of fares on the Oregon City division, the appellant charges a cash fare of twenty-five cents, which fare is made up of five five-cent zones between First and Alder Streets in Portland, and Oregon City. The Oak Grove group of stations is in the fifteen-cent zone and the fare from the Oak Grove group southerly to Oregon City is but ten cents. It would naturally follow that if the orders of the Commission should be placed in effect, that appellant would be required to reduce its fare five cents on all business of the Oregon City division either arising within the territory directly affected by the orders of the Commission, or arising in the territory south of the Oak Grove group of stations. Passengers boarding our cars at Oregon City, for instance, would be permitted to pay a fare of ten cents to the station of Risley and then, by virtue of the order of the Commission, pay an additional ten cents from Risley in to the Portland terminal.

"The record discloses that during the year 1907 there were carried on the Oregon City division approximately 800,000 passengers paying a fare of ten cents or more. As we have shown that the reduction in fare required by the orders of the Commission would affect all of this business, it is apparent that the loss upon the Oregon City division, based upon the 1907 capacity business, would be upwards of $40,000.00, which loss should be added to the deficit above mentioned.

"The court has said that the net revenue from the entire system of railways is the fund from which dividends are paid. It is conceded that appellant should be permitted a reasonable net earning upon its invested capital and it has been shown beyond any question that not only is the appellant unable to make any net earning under present conditions, but that by the enforcement of these orders of the Commission, its annual deficit would be greatly increased and the date upon which dividends might be declared from net reve-

nue postponed until such a time that only our posterity could have any interest in it.

. . . . . .

"The Commission has no power to require appellant to issue transfers to passengers from Milwaukie and Oak Grove for transportation over the lines of Portland Railway Company.

. . . . . .

"We feel that the orders of the Commission, if enforced, would result in great and irreparable injury to the appellant and would violate the rights of the appellant, which we believe to be guaranteed to it by the Constitutions of the United States and of the State of Oregon. . . ."

Federal Questions Were Considered and Passed Upon Adversely to Plaintiff in Error by Supreme Court of Oregon.

That the Supreme Court of the State of Oregon entertained the petition for a re-hearing and considered and passed upon the Federal questions raised and decided them adversely to the plaintiff in error, the party invoking their protection, may be shown best by quoting from the opinion of the State Supreme Court passing upon the petition for a re-hearing. The State court said (56 Ore. 485, 109 Pac. Rep. 273, Milw. Rec., p. 281):

"Plaintiff has presented an elaborate petition for re-hearing, amounting practically to a re-argument of the whole case. The broad position is taken that the Railroad Commission Act, the orders of the Commission, and the decisions of the court, are in violation of section 1, article 14, of the Constitution of the United States, prohibiting any State from depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the law. **We have carefully considered the able argument of counsel in support of this contention,**

but find ourselves unable to assent to their conclusions. The several principles of law stated in the argument are undoubtedly sound, and not to be questioned, but in applying the reasons of the law to the facts of the case we fail to fully agree with counsel. The principles are that a corporation is a person within the meaning of the Fourteenth Amendment, which forbids the State to deny to any person within its jurisdiction the equal protection of the laws, and prohibits the taking of property without due process of law; **that the fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstituional denial of the equal protection of the laws; that a corporation cannot be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it; and that the requirements of the Fourteenth Amendment apply both to privileges conferred and liabilities imposed, and no greater burdens should be imposed upon one than are laid upon others in the same calling and condition.''**

The foregoing is a clear statement by the Supreme Court of Oregon that it has carefully considered the constitutional questions raised by the appellant and has decided the case contrary to the appellant's contentions. We quote further from the opinion on re-hearing as follows:

''Upon the other question, the discrimination as to the amount of fare charged the respective communities by plaintiff, we are not entirely free from doubt as to the proper remedy. **It was said in the main opinion that 'the ten-cent fare between Portland and Milwaukie is not unreasonable when compared with the charges made by other railway companies for similar service.' Using that statement as a premise for an argument, it is urged in the motion that such statement is a finding that the**

specified rate is per se reasonable, which giving effect to the constitutional guaranties heretofore noted, precludes the State or its agent from making any reduction.''

Here again the court clearly states one of the constitutional points raised by the appellant but fails to sufficiently answer the point in the opinion which proceeds as follows:

> ''But it was stated in immediate connection with that remark that the law authorizes an investigation upon a complaint as to a charge, which is in any respect 'unreasonable or unjustly discriminatory.' 'The fact that a rate is per se reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on Railroad Regulation, at section 839. 'If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness per se of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by law, would be in and of itself unjust and unreasonable. Beale and Wyman, section 838.''

The foregoing is a quotation of the only language of the opinion where the court specifically mentioned the points arising under the Constitution of the United States, but that the court had these points in mind is indicated by the following quotations from the opinion on re-hearing, to wit:

"Plaintiff justifies the lower charge to and from Lents to the terminus in the city of Portland, first, on the ground that it is prevented from charging each passenger more than five cents fare, because of the alleged contract between its predecessor and the former owner of that portion of the road extending between Lents and Hawthorne Avenue. But this arises from the wrongful act of the plaintiff and its predecessor; that is, it had no lawful right or power, as was held in the main opinion, to thus bind the State or restrict it in its future regulation of fares. On account, however, of the forfeiture clause of this contract, it was doubtless considered by the Commission that to order plaintiff to increase the rate of its fare at Lents in order to avoid the discrimination complained of would cause it to hazard a greater loss than to lower the rate of fare at Milwaukie. It therefore chose the latter, and under the circumstances of the case we think it was justified in so doing, inasmuch as the foregoing clause of the contract expires by limitation on April 30, 1911, after which time plaintiff will be free to act upon its own judgment in the premises, and so to arrange its schedule of fares as to avoid any just complaint of discrimination.

"Plaintiff's second justification of the discrimination is that the cost of the construction of the line to Lents is fifty per cent. less than that of the line to Milwaukie, and in this connection it is also alleged that the agreement with plaintiff's predecessor to make a rate of fare not exceeding five cents to the people of Lents is based upon a consideration, being the value of the road bed conveyed to plaintiff's predecessor in consideration of that agreement, but the right of one locality is not thereby increased, nor is the equal right of a competing locality diminished by municipal or other subscriptions advanced for the building of the road. Beale and Wyman, section 839.

"It is also complained that the reduction of the rate from ten to five cents at Milwaukie and from fifteen to ten cents at Oak Grove will entail

upon plaintiff a considerable loss by compelling it to make equivalent reductions along the entire line to Oregon City. We do not think this necessarily follows, but, if it should, we are of the opinion that the consequences contemplated would result from the arbitrary manner by which plaintiff has divided its road into five-cent zones for regulating the amount of its charges, and for these reasons we think it ought not to be heard to complain.

. . . . . .

"The motion therefore will be denied."

Certificate of Chief Justice as to Federal Questions.

In both cases the Chief Justice of the Supreme Court of the State of Oregon made the following certificate as to Federal questions involved (Milw. Rec., p. 294; Oak Grove Rec., p. 177):

"IN THE SUPREME COURT OF THE STATE OF OREGON.

Portland Railway, Light and Power Company, a Corporation,

Plaintiff (Appellant),

VS.

Railroad Commission of Oregon,

Defendant (Respondent).

CERTIFICATE.

I hereby certify that in the above-entitled cause wherein Portland Railway, Light and Power Company is plaintiff and appellant, and Railroad Commission of Oregon is defendant and respondent and the question before the above-entitled court being the validity of that certain order of said Railroad Commission of Oregon dated the thirtieth day of January, 1908, as amended by its order of April 11, 1908, said Portland Railway, Light and Power Company claims that said order as amended deprived it of its property without due process of law and that it violated the obligation of a contract in which said Portland Railway, Light

and Power Company is interested, and that said order of said Railroad Commission of Oregon as amended was repugnant to the Constitution of the United States of America, and that the decision of the above-entitled court was against said Portland Railway, Light and Power Company and said constitutional questions claimed by said Portland Railway, Light and Power Company and that such decision was necessary to the decree rendered in the above-entitled cause.

Dated the thirteenth day of June, 1910.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon."

Federal questions having been duly raised in the Supreme Court of the State of Oregon and by that court considered and decided against the party invoking their protection, this court has jurisdiction to review the questions presented, upon authority of section 709 of the United States Revised Statutes, which provides as follows:

> "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision if in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity

specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed. (See section 1017.)

"The Supreme Court may re-affirm, reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

This section of the Revised Statutes is referred to on page 11 of the brief filed on behalf of the defendant in error in the following language:

"Neither do the cases at bar come within the provision of section 709 of the United States Revised Statutes providing review by this court of the decisions of the highest courts of the State in suits 'where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held by, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority.'"

It will be noticed that attention is called in this quotation to one clause only of section 709 of the Revised Statutes, and that clause is not the particular clause which applies to this case. We do not find any reference to the other clauses of section 709 at any point of the brief filed for the defendant in error.

Additional Points.

There are several other points mentioned in the brief filed on behalf of the defendant in error to which we think the attention of the court should be called.

1. On page 5 of that brief the following statement is made:

> "The towns of Milwaukie and Lents and the Milwaukie and Lents districts are contiguous to and in sight of each other."

The location of these two towns and the two lines of railway running to them respectively are shown on the map which appears as P. R. L. & P. Exhibit No. 1, a section of which has been reproduced and is attached to the brief heretofore filed for the plaintiff in error. That map shows that these two towns are fully five miles apart and that the two lines of railway run through different territories.

2. On page 7 of the brief filed on behalf of the defendant in error the following appears:

> "The general ground of complaint against plaintiff in error in the Oak Grove case (No. 120) is that it charges on the Oregon City division between Oak Grove, Courtney, Center and Risley and First and Alder Streets, fifteen cents without transfer privileges in Portland, while charging on the Springwater division between First and Alder Streets and Nickum five cents; Kerrigan, Bell, Lents, Lents Junction, Gilbert and Gates ten cents, and Jenne fifteen cents, all with transfer privileges, while the respective difference in distance between the respective places on the Springwater division is 3.91 miles greater than the places taking the same fare on the Oregon City division; that a reasonable rate from Oak Grove, Courtney, Center and Risley to First and Alder Streets in either direction is ten cents with transfer privileges."

The court will remember that the Mount Scott division and the Springwater division join at the station known as Lents Junction. Lents Junction is distant 8.31 miles from First and Alder Streets by the Mount Scott division, but on the Springwater division the distance from Lents Junction to First and Alder Streets is 10.71 miles. By reason of the five-cent fare established to Lents on the Mount Scott division the plaintiff in error is required to fix a new group for five cents increase in fare from Lents easterly to Lents Junction on the Mount Scott division and then easterly on the Springwater division, and, in order to make such five cents increase serve a group of stations covering approximately an equal distance to that in the five-cent groups on plaintiff's other lines of railways, plaintiff in error is required to transport passengers from Lents to Gates on the Springwater division, a distance of 2.27 miles, for an additional fare of five cents, making the total fare from First and Alder Streets to Gates by way of the Mount Scott division ten cents. Thus it became necessary that the railway company fix and establish the same rate of ten cents from First and Alder Streets to Gates by way of the Springwater division, as both lines start from a common terminus and reach the same objective, although the distance traveled by passengers on the Springwater division is 2.4 miles greater than the distance by way of the Mount Scott division. At Gates on the Springwater division the rates of fare again change from ten cents to fifteen cents and the fifteen-cent fare then covers the distance of 2.05 miles from Gates to Jenne, which is approximately the same distance in track mileage included in each five-cent zone on the Oregon City division. We repeat, the greater distance passengers are permitted to travel on the Springwater division for a fifteen-cent fare is due first to the five-cent fare to Lents and secondly to the fact that the Mount Scott division and the

Springwater division serve the same points by different routes, and, therefore, no greater charge can be made a passenger upon the longer route than upon the shorter.

In comparing, from a distance standpoint, the fare to Jenne with that to Risley in the Oak Grove group, the distance being respectively 14.43 miles and 9.26 miles from First and Alder Streets, two allowances should be made in determining whether or not there is any unjust discrimination.

First.—The five-cent limit on the Mount Scott division is 7.69 miles from First and Alder Streets. The city boundary constituting the five-cent fare limit on the Oregon City division is 5.36 miles from First and Alder Streets. Here we have a difference in the length of ride for 5 cents of 2.33 miles due to the dissimilar conditions fully set forth in the brief heretofore filed on behalf of the plaintiff in error. To this 2.33 miles should be added 2.40 miles, the difference in length of the two routes (Springwater and Mount Scott) to Lents Junction. Deducting the said two allowances, aggregating 4.73 miles from the 14.43 miles separating First and Alder Streets from Jenne, we find that for the purpose of determining discrimination from a distance standpoint, the distance to Jenne should be treated as 9.70 miles as against 9.26 miles to Risley, on the Oregon City division. Clearly there is not here a sufficient difference upon which to base a charge of unjust discrimination. Putting the same proposition in another way, the distance from Jenne to the five-cent limit at Lents on the Mount Scott division is 4.32 miles; the distance from Risley to the five-cent fare limit at Golf Junction on the Oregon City division is 3.90 miles, so that, as a matter of fact, the passenger from Jenne paying a ten-cent fare to Lents rides only .42 of a mile further than the passenger from Risley

paying a ten-cent fare to Golf Junction. Such slight differences as these in the very nature of the case must exist, as it is impossible to arbitrarily locate all stations upon the different divisions of railroads at exactly the same distances one from another. There must be some point on the line at which the fare will change and it is clearly shown that the railway company has, so far as possible, made the distances within every fare group approximately the same.

3. On pages 19 to 24 inclusive of the brief filed for defendant in error certain statements are made to which attention should be called. At the bottom of page 19 the following appears:

> "No question being presented by the issues as to the adequacy of the returns of the company as a whole no ground is presented for reviewing the orders of the Commission as to the particular rates involved herein."

A particular issue has been presented relating to the returns of the company upon all of the railroad lines owned and operated by it, being all of the lines known as the Oregon Water Power lines. The only other property owned at that time by the plaintiff in error was certain stocks of other corporations. The income derived from these stocks was not taken into consideration, for it has no bearing upon the issues involved in these cases.

Much stress is laid on page 22 of the great difficulty of analyzing the company's returns because of its widely diversified occupations. The only fact to which this statement can properly apply is the division of the general expense account of the company, twenty per cent. only of which was charged against the Oregon Water Power railway lines. There is nothing in the record to show that this division of the general expense account was not an entirely rea-

sonable and proper division and under any circumstances the amount thus charged represents a very small part only of the operating expenses charged against these railway lines. In the brief heretofore filed on behalf of the plaintiff in error the figures taken from the exhibits filed in these cases have been set forth which show accurately and intelligently the earnings and operating expenses of all of these Oregon Water Power lines of railway.

On page 21 of the brief filed on behalf of defendant in error the following appears:

> "The 'draw-back checks' issued by the company since the order of injunction, about a year, pursuant to its terms, show about $4,000 a year or even less involved."

There is nothing in the testimony to show that this is the fact and it is not an accurate statement and we object to the action of counsel for defendant in error in inserting this statement in their brief.

On page 23 a statement of Book Cost, Debt and Capital Stock appears. No reference is made to any exhibit from which this statement is taken. We have not available copies of all of the exhibits, but we have no recollection of any exhibit which shows these figures. If they do not appear in any of the exhibits which have been filed we object to the action of counsel for defendant in error in presenting them and we respectfully submit that they should be disregarded by the court. Immediately following these statements on page 23 the net income from the operations of the Oregon Water Power system is said to amount, according to the company's books, to $203,484.63 and that that is seven per cent. upon the value of the Oregon Water Power system, which is placed at $2,859,900, being $30,000 per mile for 95.33 miles (the real mileage being 95.53 miles). This value of the Oregon Water Power

railway lines, to wit: $2,859,900, is approximately correct, the error being caused by the small difference in mileage mentioned above, but the other figure of net income derived from the operations of the Oregon Water Power system is not in accordance with the testimony. The testimony shows that the net operating income instead of being $203,-484.63 is $153,826.98 (see Railway Company's Exhibit No. 16). The book cost of the Oregon Water Power lines given in the statement which appears on page 23 is $7,704,476.62 and must include the cost of certain very expensive hydro-electric plants, transmission lines and other property separate and distinct from its railway lines constructed or acquired by the Oregon Water Power Company before it transferred these railway lines and other property to the plaintiff in error.

At the top of page 24 certain other figures are given which do not appear in the testimony. They or some of them were no doubt taken from reports which have been issued by the plaintiff in error, but they include income derived by the plaintiff in error from its assets other than the Oregon Water Power railway lines which alone are involved in these cases and on that account these figures are not pertinent to any issue presented. If we turn back to page 22 we find a statement relating to the rates of the plaintiff in error on its Oregon City division since the decision of this case in the Supreme Court of Oregon. There is nothing in the testimony on this point and we object to any statement in regard to it.

4. On page 27 of the brief filed for defendant in error we find the following:

> "(e) Eliminating incompetent testimony, the most satisfactory testimony in the cases before the court as to comparisons with other rates, is

> the tariff of appellant's own charges on other lines. This was considered by the Commission and State courts, and is one of the principal factors of the lower court's findings, that the existing rates are unreasonable."

The lower court did not find that the existing rates are unreasonable in the general and ordinary acceptation of that word. It did find that the old rates were unjustly discriminatory, and on that account, were unreasonable and should be reduced. Finding of fact No. 16 (Milwaukie Record, No. 119, page 37) states that the evidence does not show that the rates are unreasonable. It is fair to assume from this finding of fact that the old rates in consideration of the service rendered were reasonable rates. If we assume for the purposes of the argument that the plaintiff in error owned and operated the Oregon City division of the Oregon Water Power lines but did not own and operate the line to Lents or any other of the Oregon Water Power lines, and further assume that the line to Lents and these other Oregon Water Power lines were owned and operated by a separate and distinct corporation there would be no basis whatever for the reduction of these old rates to Milwaukie and to other points on the Oregon City division on the ground that they were unjust or unreasonable or on any other ground. The basis of the Commission's orders reducing the rates and the decisions of the Circuit Court and Supreme Court of Oregon sustaining the orders is the alleged unjust discrimination.

We desire to call the attention of the court to the construction and interpretation of the Oregon statute adopted and approved by the Oregon Supreme Court. It holds that the statute authorizes the railroad commission to determine an issue of unjust discrimination in the matter of rates without considering any facts and circumstances therein other than track mileage.

These other facts and circumstances might sufficiently and satisfactorily explain the discrimination in rates and show that it was not unjust discrimination. If the statute provides that the commission is authorized to confine its attention in an issue of this character to track mileage alone and that the decision of the Supreme Court of the State upon the validity of any such order of the Commission is final and not subject to review by this court the statute itself must be declared unconstitutional and void for the reason that it deprives the company, whose rates are involved, of due process of law, and denies to it the equal protection of the laws.

All of which is respectfully submitted.

FREDERICK V. HOLMAN,
JOSEPH S. CLARK,
FRANKLIN T. GRIFFITH,
Attorneys for Portland Railway, Light & Power Company, Plaintiff in Error, and of Counsel.

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Nos. 119 and 120

In the Supreme Court of the United States

October Term, 1912

PORTLAND RAILWAY LIGHT AND POWER COMPANY,
Plaintiff in Error,

v.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

AND

PORTLAND RAILWAY LIGHT AND POWER COMPANY,
Plaintiff in Error,

v.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

Brief on Behalf of Defendant in Error

Writ of Error to Supreme Court of the State of Oregon.

STATEMENT

Two cases are embraced in this brief, known as the Milwaukie and Oak Grove Cases. The legal principles involved being almost identical and the facts similar, by stipulation both cases were tried together in the state courts and are briefed together for this court. The opinions of the State Supreme Court are found in 56 Ore. 468, and 57 Ore. 126.

The proceedings were instituted before the defendant in error by the Town of Milwaukie by filing its complaint with said commission

(Transcript of record herein, case 119, page 50),

and by the Oak Grove Improvement Association, by filing its complaint with said commission on the 15th day of August, 1907.

(Transcript of record, case 120, page 49),

The proceedings were instituted in each case to have the Railroad Commission declare (a) existing interurban passenger charges between Portland and Milwaukie, and between Portland and Oak Grove, to be unreasonable and unjust, and to have the commission fix and order reasonable rates substituted therefor. (b) To have the commission find and declare existing charges to be unjustly discriminatory and to fix and order substituted therefor rates not discriminatory. After full hearing and argument before the commission, on the 30th day of January, 1908, orders were made by the commission substantially as prayed in the said complaints.

(Transcript of record No. 119, Milwaukie Case, pages 60-63.)
(Transcript of record No. 120, Oak Grove Case, pages 68-71.)

Before those orders became effective plaintiff in error herein commenced original suits in equity in the Circuit Court for Marion County against the defendant in error to vacate said order. A preliminary injunction was allowed, upon terms, in each case and the rates fixed by the commission, defendant in error, have never been in effect. Although nearly six years have elapsed since the orders were made by the commission, the rates established therein have never been put into force and their

operation has been stayed all that time by successive appeals from one tribunal to another. There has never been a test of the results of the rates ordered by their being put into effect.

A full hearing was had before the Circuit Court for Marion County, Oregon. By stipulation all the testimony taken before the commission in both cases was considered in the consolidated cases in the Circuit Court. Additional testimony being taken before the Circuit Court, that court, as required by statute, stayed its proceedings and certified the cases back to the commission for reconsideration. Upon such reconsideration the commission modified its rulings in certain particulars, but adhered to the orders made.

(Transcript of record No. 119, Milwaukie Case, pages 64-65.)
(Transcript of record No. 120, Oak Grove Case, pages 72-73.)

Under the statute the amended findings and orders took the place of the originals, and were duly affirmed by the Circuit Court by decree dated June 22, 1908. The amended orders of the Railroad Commission were adjudged and decreed to be in all things and respects reasonable and in accordance with law and in full legal force and effect, and plaintiff therein, plaintiff in error herein, was adjudged and decreed in all matters, things and transactions affected thereby to obey the same in all the terms and conditions and in accordance with the intent and spirit thereof. Said decree and amendments are found in,

(Transcript of record No. 119, Milwaukie Case, pages 39-43.)
(Transcript of record No. 120, Oak Grove Case, pages 37-43.)

The Portland Railway Light and Power Company is a domestic corporation (first paragraph of complaint, transcript of record, page 2), and all of its business involved herein is intrastate, although its business is diversified as indicated by its name; it furnishes light and power in a number of cities as well as operating street and interurban railroads.

When the case was tried in the state courts and before the Oregon Railroad Commission, the plaintiff in error railroad company owned and operated the system of suburban and interurban railroads formerly known as the "Oregon Water Power" system. The western terminus of the various divisions of this line was First and Alder Streets in the City of Portland. All the lines or divisions run from the city outward across the Madison Street Bridge, on the same track for about one mile to Water Street. There the "Oregon City" and "Springwater" divisions branch off and run over the same track along the Willamette River up stream to Golf Junction, on the southern boundary of the City of Portland and the Clackamas County line, 5.36 miles from First and Alder Streets. The "Oaks" cars also use this line to the Oaks during a part of the year. From Golf Junction the *Oregon City Division* runs southward through *Milwaukie, Oak Grove,* Courtney, Center, Risley, through Oregon City to Canemah, about one mile south of Oregon City. The *Springwater Division* extends from Golf Junction eastward and thence southward through Nickum, Lents Junction, Gates, Sycamore and Jenne on to Cazadero, Clackamas County. The *Mt. Scott Division* runs from the Water Street junction east along Hawthorne Avenue to Lents, 7.7 miles from First and Alder Streets, and thence on to Lents Junction, .62 miles further, where it joins the Springwater division. Lents is 2.75 miles outside the city limits of Portland.

Sellwood Line.—This line extends from Twelfth Street and Hawthorne Avenue south to Golf Junction. Cars run

over this line from Milwaukie to First and Alder Streets, two every 45 minutes, and one car runs from Oregon City via Oak Grove, Milwaukie, Golf Junction and the river line every 45 minutes.

Troutdale Division.—This line is a branch from Linneman, on the Springwater division, to Fairview and Troutdale.

St. Johns Line.—This line runs from its terminus on Second and Alder Streets in Portland northward across the Willamette River to the City of St. Johns in Multnomah County. It was formerly owned under the name of Portland Railway Company, the stock of which was held by the plaintiff in error, which company took over the legal title during the pendency of these suits in the state courts.

Plaintiff in error also owns and operates as a part of its system the business formerly conducted by Portland General Electric Company, in selling electric light and power in Oregon City, Milwaukie, St. Johns, Portland, Salem, Woodburn, Silverton and elsewhere, illuminating gas in Salem and a street railway in the latter city.

The Town of Milwaukie and Lents and the Milwaukie and Lents districts are contiguous to and in sight of each other. Milwaukie is a highly improved little city; most of her citizens work in Portland and travel back and forth to the city daily. The same may be said in a somewhat lessened degree of the Oak Grove district, which lies just south of the Milwaukie district. The orders in question affect only the rates of fares on the Oregon City line except as Milwaukie passengers use the Sellwood line as an alternative route. The only fares affected by the order and decree in No. 119

(Abstract of record, pages 41-42)

are those between Milwaukie and First and Alder Streets in the City of Portland in either direction. These were

reduced from ten to five cents, and it was ordered and decreed that passengers be accorded the same transfer privileges that are accorded to passengers traveling between Lents and First and Alder Streets in either direction.

(Abstract of record No. 119, page 42.)

The only fares affected in case No. 120 are those between Milwaukie Heigths, Courtney, Oak Grove, Center and Risley and First and Alder Streets. These were reduced from fifteen to ten cents, and it was ordered the same transfer privileges be given from such points that are accorded passengers traveling between Lents and First and Alder Streets.

(Record case 120, page 41.)

The general ground of complaint before the Railroad Commission in the Milwaukie case (No. 119) was that since May 13, 1901, the plaintiff in error and its predecessors, carried and still carry passengers from Lents on its Mt. Scott division to First and Alder Streets in Portland, a distance of 7.69 miles, and from Nickum on the Springwater division to same point, 6.51 miles, for five cents with transfer privileges in each case, while charging and collecting from the citizens of Milwaukie, traveling between Milwaukie and First and Alder Streets in Portland, a distance of 6.71 miles, the sum of ten cents without transfer privileges.

From the city limits of Portland, Lents is 2.75 miles distant, Nickum 3000 feet and Milwaukie 1.35 miles. The foregoing difference in fares and transfer privileges was claimed to be an unjust discrimination and an undue preference against the town and citizens of Milwaukie and the Milwaukie district, and in favor of the citizens of Lents and Nickum and the Lents and Nickum districts. It was also alleged that a reasonable fare between Milwaukie and First and Alder Streets in either direction with transfer privileges was five cents.

The general ground of complaint against plaintiff in error in the Oak Grove case (No. 120) is that it charges on the Oregon City division between Oak Grove, Courtney, Center and Risley and First and Alder Streets, fifteen cents without transfer privileges in Portland, while charging on the Springwater division between First and Alder Streets and Nickum five cents; Kerrigan, Bell, Lents, Lents Junction, Gilbert and Gates ten cents, and Jenne fifteen cents, all with transfer privileges, while the respective difference in distance between the respective places on the Springwater division is 3.91 miles greater than the places taking the same fare on the Oregon City division; that a reasonable rate from Oak Grove, Courtney, Center and Risley to First and Alder Streets in either dircetion is ten cents with transfer privileges.

In each case it was alleged that this difference in fares and transfer privileges was an unjust discrimination and an undue preference against the said towns and the inhabitants of these localities on the Oregon City division and in favor of the said towns and inhabitants thereof on the Springwater and Mt. Scott divisions and was greatly injurious to the said towns, people and localities on the Oregon City division. That all the said towns and localities are suburbs of the City of Portland, and a keen rivalry exists between the citizens of these places in obtaining cheap transportation and in building up and increasing the population of their respective towns, stations and districts, and the land values and commercial interests thereof, and that this unjust discrimination and undue preference has built up the said districts, stations and towns and increased the land values thereof on the Mt. Scott and Springwater divisions, while the towns, districts and localities, population, land values, etc., on the Oregon City division have remained the same and become stagnant.

The defense offered by the plaintiff in error before the Railroad Commission for such discrimination and undue preference is: (a) That it is bound by a contract made by its predecessors with the Chicago and Mt. Scott Railroad

Company to give the inhabitants of the Lents district a five cent fare and that it is thereby compelled to make Lents, a distance of 2.75 miles outside of the city limits of Portland on the Mt. Scott division, the basis of its fare outside of the City of Portland on the Mt. Scott and Springwater divisions instead of the city limits of Portland, which are the natural and legal basis of appellant's rate making, on account of the law making an arbitrary fare of five cents to persons traveling to any point within the city limits. (b) That the defendant in error has no jurisdiction to consider discrimination between localities in adjusting rates. (c) That the circumstances and conditions for a like and contemporaneous service must be the same and that in the cases at bar they are dissimilar.

The cases present the following questions:

1. Whether a Federal question is involved.

2. The reasonableness of the rates ordered by the Railroad Commission of Oregon and decreed by the Oregon court to be reasonable as compared with other charges of the company.

3. Whether the present rates are unjustly discriminatory and preferential against the Milwaukie and Oak Grove districts, and against the inhabitants thereof.

The discrimination being admitted and justification thereof attempted, the question arises as to whether the "Lents Contract," difference in population, cost of road, etc., prevent such discrimination from being unjust.

The Lents contract is set forth in transcript of record herein,

(Milwaukie Case No. 119, pages 80-82.)
(Oak Grove Case No. 120, pages 161-162.)

If the rates ordered by the commission are reasonable, and its action lawful, the question of discrimination becomes immaterial. On the other hand, if the findings of the commission as affirmed and decreed by the state courts, of unjust discrimination are correct, and the proper remedy applied, then the question of the reasonableness of rates becomes immaterial. If the commission is within the law in either finding, the state court should be affirmed. This court will not reverse the cases unless the commission and state courts are in error on both propositions.

No issues of the confiscation of property of plaintiff in error or of deprivation of property without due process of law are tendered in the complaint, nor are such issues involved in either case. The only real issue tried was the attempted justification under the Lents contract and by reason of alleged dissimilar conditions.

(Transcript of record, Case 119, pages 3 to 12 inclusive.)

(Transcript of record, Case 120, pages 2 to 12, inclusive.)

ARGUMENT

I.

DEFENDANT IN ERROR CONTENDS THAT NO FEDERAL QUESTION WAS RAISED BY THE PLEADINGS, NOR NECESSARY TO THE DECISION, IN EITHER CASE INVOLVED IN THESE PROCEEDINGS, AND THEREFORE THIS COURT HAS NOT JURISDICTION TO REVIEW THE DECISIONS OF THE STATE COURT IN SAID CASES OR EITHER OF THEM, AND THE SAME SHOULD BE DISMISSED.

Simkins, in Federal Equity Suit (2d ed.), page 135, under the heading "What is a Federal Question?" says: "A case presents a federal question when it becomes necessary to construe the constitution, laws, or treaties of the

United States in order to reach a correct decision of the material issues, or to decide as to the existence of some right, title, privilege, claim or immunity asserted under the federal constitution and laws, or when plaintiff relies upon them in whole or in part for a recovery." After citing numerous cases the author continues:

"It may be stated in another form, thus: The suit must be such that some right, privilege, immunity, or title on which recovery depends will be defeated by one construction of the constitution or laws, or sustained by a contrary construction."

The rule is supported, and, we might say, adduced from the following cases, some of which are cited by the author just quoted.

Starin v. New York, 115 U. S. 248, 256-7.
Cooke v. Avery, 147 U. S. 375, 348-5.

The author (Simkins, page 136) also quotes from Judge Shiras' Equity Practice, as follows:

"Judge Shiras, in his Equity Practice, page 17, says the jurisdiction in the phrase, 'Cases arising under the constitution, laws and treaties made,' etc., is divided into two classes.

"First. Where the cause of action springs directly from some provision of the Federal laws, as when the right claimed is directly given by Federal law, or where the cause of action arises out of some act of a Federal officer, based on Federal law, as in cases of United States marshals. This is designated as jurisdiction direct and primary.

"Second. When causes of action are based on or supported by the laws of the state thought to be in conflict with some right, duty, power, or franchise created or conferred by the constitution of the United States, or its laws and treaties. This may be designated as derivative, or secondary, jurisdiction."

All parties interested in these suits are residents of Oregon, and no question involving a construction of the federal constitution, statutes or treaties is alleged in the

complaint, and a case which may be brought in a federal court or which may be removable from a state court, must in fact involve a controversy, the determination of which depends on the construction of the federal law.

New Orleans v. Benjamin, 153 U. S. 411, 424, 431.

Neither do the cases at bar come within the provision of Sec. 709 of the U. S. Revised Statutes providing review by this court of the decisions of the highest courts of the state in suits "where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission held by, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority."

Carson v. Dunham, 121 U. S. 421 (7 S. C. R. 1030).

When the facts only are in dispute no federal question is involved.

Myrtle v. Nevada, C. & O. Ry. Co., 137 Fed. 193-195.

Nor when the federal question is unnecessary to the decision.

Parmelee v. Lawrence, 11 Wallace 36-38.
Railroad Company v. Rock, 4 Wallace 177-180.

A brief synopsis of the bill of complaint in the light of the foreging authorities discloses no issues giving this court jurisdiction. Nothing is claimed by plaintiff in error arising out of any title, right, commission or authority under the federal constitution, statutes or treaties. The complaint (Milwaukie case No. 119) contains 28 paragraphs, the substance of each follows:

1. Sets forth that plaintiff in error is an Oregon corporation, and mentions some of the properties it controls and operates, all being within this state.

2. Sets forth the rates it charges.

3. Sets forth divisions into which its system, as far as involved in these suits, is divided.

4. That under Sec. 2096, B. & C. Ann. Codes and Stat. of Oregon (2207 L. O. L.), it is prohibited from charging more than five cents per passenger in the City of Portland.

5. That it charges 25 cents from Portland to Oregon City, 14.47 miles.

6, 7, 8 and 10. Relate to fares. Shows differences.

9. Alleges conditions are dissimilar.

11. That track from Mt. Tabor Junction to Lents was acquired under an agreement not to charge more than five cents per passenger with transfer privileges. This is the "Lents Contract" before mentioned.

12, 13, 14, 15, 16, 17. Attempt to explain and justify rates—claiming them to be reasonable, but nothing is stated relative to value, maintenance, revenues, operating expenses, etc.

18, 19. Recite order of Railroad Commission and acknowledges service thereof.

20. Denies charges to be unreasonable or discriminatory, but alleges no facts.

21. Charges commission with ignoring facts and conditions in making orders, but makes charges in general terms, alleging no facts showing injury.

22. That rates from Milwaukie to First and Alder Streets were reasonable and afford only reasonable compensation for service performed.

23. That by said action plaintiff in error is compelled to carry passengers from the Town of Milwaukie 1.35 miles to Golf Junction without compensation and not within power of commission to so order. That Golf Junction is

within the city limits of Portland, where all fares must be not more than five cents under a state statute. Milwaukie is just outside (1.35 miles) and fares from Milwaukie were placed at five cents to First and Alder Streets. Hence the contention, although a part of the general system.

24. Charges that the rates fixed by the orders will deprive plaintiff in error of a just and reasonable compensation, or of any net profit or return upon the transportation of passengers traveling over the portions of said railroad affected by the orders, and hence the orders are unreasonable. (No facts are alleged to support or from which conclusions can be drawn.)

25. That commission exceeded its power in that it based its order on its own finding that rates charged by the plaintiff in error were unjustly discriminatory.

26. That to permit said order to go into effect would unjustly and seriously impair the revenues of plaintiff in error.

27. No adequate remedy at law.

28. Orders would result in irreparable damage.

Not a syllable appears in the bill of complaint to the effect that the above are confiscatory of the property of the plaintiff in error or that they in effect result in taking its property without due process or that it is denied equal protection of the law. Paragraph 23 of the complaint contained the only allegation which in any way remotely indicates that the order might be confiscatory, etc. It alleges:

"That the distance on said 'Oregon City Division' between said Golf Junction and said Town of Milwaukie is 1.35 miles, and that in and by said order of the said defendant, plaintiff is required and commanded to transport persons traveling as passengers over said 1.35 miles of plaintiff's said railroad for no compensation whatever, which action of said defendant this plaintiff alleges to be unjust,

unreasonable and not within the power of said defendant under the terms and provisions of said Chap. 53 of the general laws of Oregon, Session 1907." It will be observed that no facts are alleged to show that plaintiff is by said order, or either of them, required to carry passengers over said 1.35 miles without compensation or without reasonable compensation. It is true that said strip of road is in the city division and in that division because plaintiff alleges it was inconvenient for it to establish a station on the city boundary. Further, the small piece of track is a part of its entire system and located many miles from either terminus. The plaintiff could pick out a short piece of track between any two stations and make the same claim for it. The contention impresses us as being sublimely absurd and therefore we will discuss it no further.

It will be remembered that the plaintiff in error did not attempt to raise a federal question until it filed its motion for rehearing in the Supreme Court of the State of Oregon, in which motion it first presents the suggestion of being deprived of its property without due process of law, in violation of section 1 of the 14th amendment of the federal constitution, and that it is being denied equal protection of the law, and that the rates fixed by the commission are confiscatory. For petition for rehearing see transcript of record No. 119, Milwaukie case, pages 254-275. In No. 120 (Oak Grove case) no formal petition for rehearing was filed, but in the transcript of record, page 177, we find the following certificate by the Chief Justice of the Oregon Supreme Court, to-wit:

"I hereby certify that in the above entitled cause wherein Portland Railway, Light & Power Company is plaintiff and appellant, and Railroad Commission of Oregon is defendant and respondent, and the question before the above entitled court being the validity of that certain order of said Railroad Commission of Oregon dated the 30th day of January, 1908, as amended by its order of April 11, 1908, said Portland Railway, Light & Power Company claims that said order as amended deprived it of its property with-

out due process of law and that it violated the obligation of a contract in which said Portland Railway, Light & Power Company is interested, and that said order of said Railroad Commission of Oregon as amended was repugnant to the constitution of the United States of America, and that the decision of the above entitled court was against said Portland Railway, Light & Power Company and said constitutional question claimed by said Portland Railway, Light & Power Company and that such decision was necessary to the decree rendered in the above entitled cause.

Dated the 13th day of June, 1910.

Frank A. Moore,
Chief Justice of the Supreme Court of the State of Oregon."

Notwithstanding the statements of said certificate the record fails to show that any tender of the issues mentioned therein was made by plaintiff in error in the court below, or that such were decided or were necessary for a decision of either case.

Milwaukie Case (No. 119):

For Complaint, see Transcript of Record, pp. 2 to 12.
For Order of Commission, see Transcript of Record, p. 13.
For Answer, see Transcript of Record, p. 22.
For Decree Circuit Court, see Transcript of Record, pp. 39-43.
For Decree Supreme Court, see Transcript of Record, pp. 253-254.

Oak Grove Case (No. 120):

For Order of Commission, see Transcript of Record, pp. 13-16.
For Complaint, see Transcript of Record, pp. 2-12.
For Answer, see Transcript of Record, pp. 23-25.
For Decree Circuit Court, see Transcript of Record, pp. 37-41.
For Decree of Supreme Court, see Transcript of Record, pp. 166-167.

It is too late to raise a federal question after a decision in the highest court of a state on petition for rehearing, nor will the certificate of the Chief Justice be sufficient for that purpose when the record shows affirmatively that no federal question were raised by the pleadings, none decided and that none were necessarily involved in the decision of the case.

It cannot be disputed in the light of the decision of this court that plaintiff in error was too late in its effort to inject a federal question into these cases. The decision on the petition for a rehearing expresses no more than would be implied from a simple denial of the motion. The court in denying the motion does not discuss the question of due process, equal protection or confiscation, except to show that the same were not involved and were unnecessary to the decision, and that the decision rested mainly on unjust discrimination practiced by plaintiff in error and which was within the power of the commission to rectify by an order directed to the plaintiff.

Is the certificate of the judge that a federal question was decided sufficient? In Fullerton v. Texas, 196 U. S. 192, at pages 193 and 194, Chief Justice Fuller, writing the opinion of the court, says:

"Some weeks after the denial of the motion for a rehearing, this writ of error was allowed by the presiding judge of the Court of Criminal Appeals, who certified that on that motion it was contended 'that under the evidence in the cause plaintiff in error was engaged in intrastate commerce and commerce between different states within the meaning of Article 1, Section 8 of the Constitution of the United States, and that the statutes of the State of Texas could not make such matters and transactions an offense, and that to do so would violate said constitutional provision.' And further, 'that said contention was duly considered by us and decided adversely to plaintiff in error.'

"But on the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or declined to pass on the alleged constitutional

question, in terms, because it was suggested too late, and nothing is more firmly established than that such a certificate cannot in itself confer jurisdiction on this court. Henkel v. Cincinnati, 177 U. S. 170; Dibble v. Bellingham Bay Land Company, 163 U. S. 63."

The state court in disposing of the motion for rehearing in the cases at bar did not consider the value of the properties of plaintiff in error. Original or reproductive value nor depreciation, their gross or net earnings, operating expenses, indebtedness, nor any fact which would tend to show that the railroad's property was being confiscated or that it was in any way being "deprived of its property without due process of law," or denied the equal protection of the law. Plaintiff in error tendered no such issue and presented no evidence on such a theory.

In the light of the decisions of this court we submit no federal question was raised in the state court, and none was decided or necessary to a decision of the issues, and that the writs of error in these cases should be dismissed.

II.

REASONABLENESS OF THE RATES ORDERED BY THE RAILROAD COMMISSION AND DECREED BY THE STATE COURT.

(a). The defendant in error contends that if the rates established by the commission are not so unreasonable as to amount to confiscation of the property of the plaintiff, or to deprive it of some right guaranteed it under the constitution of the United States, and there was a hearing at which substantial testimony was adduced which tends to support the findings of the commission, then the order of the commission will not be disturbed, either by this or any other court.

It will be borne in mind that there is no question raised as to the regularity of the proceedings below—that the commission acquired jurisdiction, conducted its hearings,

and made and served its orders in the manner prescribed by law.

The question of the scope of judicial review of rate making tribunals has been before this court so frequently within the last few years that it would seem that citations of this court's own holdings would be unnecessary. We take it that the law is now so well established by the decisions of this court that it need only be referred to: that courts have no authority to re-examine the findings of a rate making commission, such as the defendant in error, as to subjects properly within its jurisdiction, except for the purpose of determining whether the action of the commission was repugnant to the constitution, in excess of the statutory powers conferred upon it, or manifestly such an abuse of discretion as to be equivalent to an excess of authority, or based upon a mere shadow instead of substantial evidence.

U. S. v. Baltimore & Ohio Railroad Co., 32 Supreme Court Reporter, 817, 820.

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 547, and cases cited.

Interstate Commerce Commission v. Delaware, etc., 220 U. S. 235, 251.

There can be no question raised that the delegation of power by the Oregon Legislature to the defendant commission to apply the statutory rules laid down in the Railroad Commission Act to specific facts, such as fixing reasonable railroad rates, is an unconstitutional delegation of power, or unconstitutionally intermingles the powers of government. This question—purely one of construction of the state constitution—has been finally settled by the Supreme Court of Oregon in favor of the constitutionality of the Railroad Commission Act.

State v. Corvallis & Eastern Railroad Co., 59 Oregon 450, 454-5.

This ruling of the highest court of the State of Oregon as to the construction of its own constitution is binding upon this court.

(b) The Standard of Reasonableness is in the Whole Schedule.

These cases do not involve a whole schedule of rates—only a small number out of many maintained by the railroad are affected.

Particular rates fixed by legislature or commission may not be attacked without showing the body of rates as a whole does not bring in sufficient return to the carrier. The carrier's concern is as to the returns from the business as a whole, and not the adjustment of particular rates among themselves.

Wilcox v. Consolidated Gas Co., 29 Sup. Ct., 192 212 U. S. 19, 54.

Minneapolis, etc., R. Co. v. Minnesota, 186 U. S. 257, 258.

Atlantic Coast Line v. North Carolina Corp. Comm., 206 U. S., 1, 24-25.

Gulf, C. & S. F. R. Co. v. R. R. Comm., 113 S. W. (Tex. Sup. Ct.), 741, 747.

The return on the whole schedule affords no light on the reasonableness of a particular rate.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S., 257.

Noyes, Amer. R. R. Rates, 25, 28-35.

Central Yellow Pine Assn. v. Ill. Cent. R. Co., 10 I. C. C. Rep., 505, 538-540; affirmed 206 U. S. 441.

Brewer v. Louisville & N. R. Co., 7 I. C. C. Rep., 224, 238.

No question being presented by the issues as to the adequacy of the returns of the company as a whole, no

ground is presented for reviewing the orders of the commission as to the particular rates involved herein.

(c) Decrease in Rates not neessarily followed by Diminution of Revenue.

There is no presumption of law appellant will be injured by the reduction of rates ordered by the commission. The courts will not interfere until there has been an actual, bona fide trial of the new rates. This has not been had in this case. Between five and six years have elapsed since the orders were made, and they have never been enforced a single day.

Wilcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192.
Mayor, etc., v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148.
Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339.
Central of Georgia R. Co. v. McLendon, 157 Fed. 961, 978.
Quimby v. Clyde S. S. Co., 12 I. C. C. Rep., 392, 396.
Brewer v. Louisville & N. R. Co., 7 I. C. C. Rep., 224, 238.

The record shows a very substantial return to the company from the schedule as a whole, that fact is not in issue. The effect of the orders in question is problematical; in any event the loss in revenue to the company would be inconsiderable, and in all human probability the company's revenues would be increased by stimulation of business.

Wilcox v. Consolidated Gas Co., 29 Sup. Ct. 192, 199, 212 U. S. 19-42.

The record does not show the cost of the particular portion of road in question, nor is there sufficient in the record to permit any calculation as to the relative or actual cost of the service performed.

(d) The Rates Ordered by the Commission are in Fact Reasonable.

It should be borne in mind that the reasonableness of a particular rate involves the limit of reasonableness both as regards the company and as regards the public. (Beale and Wyman, R. R. Rate Regulation, Sec. 500.)

The schedule as a whole now yields a sufficient and very substantial return to the company.

The effect of the reduction is problematical. The vice-president and manager, Mr. Fuller, estimated that based on past business the reduction made by the order, directly would amount to $7,800 a year. (Transcript of record herein, page 176, case 119.) The "drawback checks" issued by the company since the order of injunction, about a year, and pursuant to its terms, show about $4,000 a year, or even less, involved. A hypothetical question was asked as to how much the reduction would be, assuming about 800,000 passengers traveled a year, and the company had its revenue cut five cents on each. (Transcript of record herein, page 160, case 119.) Not only was there no foundation for such a question, but it was in fact erroneous, even preposterous. (See cross-examination of Mr. Fuller, transcript of record, pages 173 to 176, case 119.) He said he had no figures to show the number of passengers who would be directly affected by the order. (Page 176.)

Nor is it certain that there will be any reduction in the company's net earnings. Says the Supreme Court in the Consolidated Gas case (29 Sup. Ct. 199):

"And again, increased consumption at a lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.

"The elevated railroads in New York, when first built, charged 10 cents for each passenger; but, when the rate was reduced to 5 cents, it is common knowledge that their receipts were not cut in two, but that, from increased patronage, the earnings increased from year to year, and soon surpassed the highest sum ever received upon 10-cent rate.

"Of course, there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property; but it is equally true that a reduction in rates will not always reduce the net earnings, but, on the contrary may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test."

Nor if a reduction were to be made on the whole business of the Oregon City line would the company's revenues be affected so seriously as to be confiscated. This statement is not made ill-advisedly, for the rates of the plaintiff in error on its Oregon City division have, since the decision below, been lined up to conform with those involved herein, and such rates have been in effect for a considerable time without attack.

We find difficulty in analyzing the company's returns, because it is engaged in widely diversified occupations and a very considerable portion of all its expense is general and common to all the businesses. It has arbitrarily assigned these general items in round figures, so much to the "General Electric" lines, so much to the "City" lines and so much to the "O. W. P." lines. (See transcript of record, pages 144, 145, case 119.) Without questioning the company's good faith, we submit that such a method of arbitrary division furnishes no safe guide for either the judicial or administrative mind and the element in doubt is so large that calculations based on it are worthless. It is like the surveyor who went out by day, paced or guessed his distances, and going home worked out the results by night to four decimal places. Contrast this "rule of thumb" method with the very scientific division made by the Wisconsin Commission in Buell v. C. M. & St. P. Ry. Co., 1 Wis. R. R. Comm. Rep. 508, and to the painstaking divisions of costs submitted in the various state rate cases now under submission in this court.

It has been strikingly pointed out by Prof. Robinson in Yale Law Review (see Railroad Age Gazette, p. 1148, Oct. 16, 1908) that a difference in the method of dividing these common expenses even as between freight and passenger traffic may determine whether the rates are confiscatory or not, according to the rule adopted. Much more is this the case when the assignment is between entirely distinct businesses conducted by a single management—electric light, power, city lines, interurban lines, ferry, gas and street car in one town, water power at another, retail electrical supplies—and is made not according to any fixed rule supposed to have any relation to relative cost, but merely as a matter of bookkeeping, 40 per cent to one department, 40 per cent to another and 20 per cent to another. The results are worthless for statistical analysis.

Even on their statement we find this:

YEAR ENDING JUNE 30, 1907.

Book cost of road, equipment, etc., to date (including only O. W. P. line)		$7,704,476.62
Six per cent mortgage bonds outstanding	$ 4,431,000.00	
Five per cent miscellaneous obligations outstanding	4,000,000.00	
Total funded debt	$ 8,431,000.00	
Excess of funded debt over cost		726,523.38
Capital stock	$15,000,000.00	

Mr. Fuller, vice-president of Portland Railway, Light & Power Company (transcript of record herein, p. 155, case 119), put the value at $30,000 for 95.33 miles, or $2,859,900 for the "O. W. P." system. He put the line from Golf Links to Milwaukie at $19,000 per mile, or $28,000 for the 1.69 miles. (Transcript of record, p. 165, case 119.) The net income from operations of the "O. W. P." system, according to the company's books, $203,484.63, was 7 per cent of the value. The net income of the company, after

paying operating expenses, interest on all above funded debt, taxes, and $46,415 "organization expense of Portland Railway, Light & Power Co.," was $605,265.66. Out of this it paid 5 per cent in quarterly dividends on $5,000,000 preferred stock, and had $355,340 to carry to its surplus account, or 3.55 per cent on the $10,000,000 of common stock. Not much like possible confiscation here because the State cut two cents off the Milwaukie fare and five cents from Oak Grove. The court below gave up trying to guess, and found that the evidence was not sufficient to show the value of the property used, nor of any division, nor the income, expenditures, or profits or loss, from any division of plaintiff's line, or the cost of transporting passengers. (Finding 17, page 37, transcript herein No. 119, Milwaukie case.) The situation is exactly as in the Cumberland Telephone Case (32 Sup. Ct. Rep. 741)—the whole question is "in the air."

Fortunately this court does not have to speculate or guess as to results, nor does it have to analyze the capitalization of the company, nor go into minute calculations based on insufficient data leading only to an unsatisfactory and inconclusive end. This court has pointed out the rule so clearly that its justice must be apparent to all:

"Where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as possible, the doubt arising from opinions as opposed to facts."

Willcox v. Consolidated Gas Co., *supra* (29 Sup. Ct. Rep. 192, 196), 212 U. S. 19-42.

"We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put in operation; the inferences were based upon the operations of the preceding year; and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. The city authorities acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization, and earnings.

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind."

Knoxville Water Case, 212 U. S. 17 (29 Sup. Ct. 148, 154).

The inquiry as to the reasonableness of the rates involves a consideration:

1. Of the value of the service to the passenger.

2. Of the cost of the particular service—which, as shown by Judge Noyes, can not be ascertained with our present means of accounting, and certainly has not been developed in this case.

3. Of the charges made for similar services by the same and other carriers.

I. C. C. v. Chi. Gt. Western Ry. Co., 141 Fed. 1003.

The Commission found that the existing charges of ten and fifteen cents respectively were unreasonable, and that reasonable charges would be five and ten cents.

The Circuit Court made the following finding:

"That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mount Scott divisions, the charges of the plaintiff for transportation of passengers between said First and Alder streets and the town of Milwaukie, are unjust and unreasonable."

Finding 16, Record, Case 119, p. 37.

This was a correct finding of fact. As said by the Supreme Court below (56 Ore. 488), "the question presented for consideration is not the reasonableness *per se* of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service."

The question was considered by the Interstate Commerce Commission in connection with rates for carriage of shingles from Fredericton and Fort Fairfield, respectively, to Boston. The two places in question were situated on different branches of the same railroad. Mr. Commissioner Veazy said:

"A departure from equal mileage rates on different branches or divisions of a road is not conclusive that such rates are unlawful, but the burden is on the company making such departure to show its rates to be reasonable when disputed.

"The essential question here is one of relatively reasonable rates; not whether either rate is reasonable in itself. It is the effect of the carriers' action at one point upon the legitimate business prosperity of another point, which is the vital point in this controversy. If the present Fredericton rate does not actually result in profit, the carriers should not seek to control or stimulate traffic from that point by making the rate so low; and if they carry for unusually small compensation from that place they do so under the same injunction of the law that their action must not inflict undue prejudice or disadvantage upon other

communities or persons. When a carrier engages in transportation for which, by reason of competitive conditions or for purposes of its own, it receives less rates from some patrons and at some localities, it accepts the legal obligation to give impartial service to other patrons and at other localities that sustain similar relations to the traffic."

Logan v. C. & N. W. R. R. Co., 2 Int. Com. Rep. 431. See also 2 I. C. C. Rep. 604-612.

Board of Trade of Lynchburg v. Old Dominion S. S. Co., 6 I. C. C. Rep. 632, 646.

Lincoln Board of Trade v. Burlington & M. R. R. Co., 2 Int. Com. Rep. 95; 1 I. C. C. Rep. 147.

Geo. Tileston Mill Co. v. Northern Pac. R. Co., 8 I. C. C. Rep. 346-354.

(e) Eliminating incompetent testimony, the most satisfactory testimony in the cases before the court as to comparisons with other rates, is the tariff of appellant's own charges on other lines. This was considered by the Commission and state courts, and is one of the principal factors of the lower court's findings, that the existing rates are unreasonable.

Transcript of Record, Case 119, pp. 33 and 34.
Transcript of Record, Case 120, pp. 13 and 14.

In the cases at bar, it is impossible, from any testimony received, to determine the number of passengers, average length of haul, or any other factor necessary or competent to determine the reasonableness of any particular rate on any of the divisions involved in these suits, and the court will not permit itself to be misled by any incomplete statistics into making any unwarranted deduction.

"The question whether the rates are just and reasonable in themselves, is in some measure a relative one; that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a similar service, and whether the instances thus employed are or are not such as by their relation to the case in hand, are subject to the operation of some other provision of the Commerce

Act, is immaterial. Besides, I think the question of the justness and reasonableness of rates, under the first section (Cf. Oregon Act, Laws 1907, Chapter 53, Section 12), is colored by other provisions of the law, and by the general policy of the whole enactment, which is to effect the equality of charges. And, at all events, it seems to me clear that the charges accepted for a longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul. Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, for the presumption would always be that the compensation charged for the service or thing is sufficient to be reasonable."

> Interstate Commerce Commission v. East Tennessee, V. & G. Ry. Co. *et al.*, 85 Fed. 107, 114.

On appeal this court did not pass upon the reasonableness of the lower rate in itself, on the ground that the Commission had not done so.

> 181 U. S. 1.
> See also Int. Com. Comm. v. Southern Ry., 117 Fed. 741.

The value, if any, of evidence as to other rates introduced under a showing as to the conditions and circumstances of transportation, was entirely for the Commission.

> Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S. 541.

III.

AS TO RULES APPLIED AND EVIDENCE CONSIDERED BY THE STATE COURT.

(a) Plaintiff in error avers that the Supreme Court in the cases at bar bases its decision on what might be called the "yard stick rule," and that its application to the cases at bar was unlawful.

While it must be considered that passenger fares may usually be made on a mileage basis (Savannah Bureau v. Charleston, etc., R. Co., 7 I. C. C. 601), in this case we submit that the Court considered all circumstances and found that plaintiff was simply discriminating unjustly between localities. It did apply the rule announced in Menacho v. Ward (C. C.) 27 Federal 529, quoting from page 532, after having first found that the services performed were of a like and contemporaneous nature. The word "like" is used in the statute and was so understood and used by the Court, as meaning "similar; resembling," and "contemporaneous," as meaning "at or about the same time." Then the Court in said case, 27th Fed. at page 532, says:

"The fact that the carrier charges some less than others for the same service, is merely evidence for the latter, tending to show that it charges them too much, but when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services or property, is always sufficient against him to establish the real value, but it has augmented probative force and is almost conclusive against him when he has adopted it in a long continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public." The Court found in the cases at bar that for many years, plaintiff in error had been charging only a five cent fare from Lents to Portland, First and Alder streets, with transfer privileges to other lines controlled by it, the distance being 3.51 miles outside of the corporate limits, while it had been charging a ten cent fare from Milwaukie on a line it was operating almost parallel with the Lents line, without transfer privileges, Milwaukie being only 1.35 miles beyond the city limits, and the Court applied

the rule above announced, and in its decision, 56 Oregon, at page 483, in discussing the contention of plaintiff that the rate of transportation and the privileges prescribed in the order of the defendant and decree complained of, will not furnish a reasonable return on the capital invested, and that neither the defendant nor the Court can speculate as to the probable effect upon plaintiff's business, or upon the consequences, or any change in the population, or in the value of the property in the affected district, and that if any reduction is proper, an arbitrary diminution of five cents as to Milwaukie is unjust and unreasonable, said:

"We do not think it necessary to discuss either of these questions, for the plaintiff having agreed to accept a fare of five cents for carrying passengers between Portland and Lents, thereby asserted the value of the employment so rendered, by which measure it must be governed for similar service on the Oregon City division, an equal distance beyond the boundaries of the city of Portland."

And then cited the 27th Federal, and quoted therefrom the above rule.

The Court holds this to be unjust discrimination, and that the charging of the five cent fare from Lents and the ten cent fare from Milwaukie to the same point in Portland, giving a transfer with the lesser fare, denying it with the greater, cannot be justified on the ground of the Lents contract, the lower cost of constructing the line, density of traffic, nor difference in cost of construction; that in effect, neither one nor all combined are sufficient to justify the discrimination, and concluded that the service being alike and contemporaneous must be performed for an equal consideration, in effect holding that while a discrimination between localities might be justified by circumstances, no circumstances exist in the cases at bar to warrant the discrimination. Hence it is unlawful and it is within the power of the Railroad Commission to remedy. In discussing the requirement of

the Oregon Railroad Commission law in connection with Section 2 of the Interstate Commerce Law, the Court holds that the requirements to furnish a "like and contemporaneous service," as employed therein, is not limited to transportation over the same line, but extends to service on other lines operated by the same Railway Company, and particularly so when electric cars are used on urban, suburban or interurban railroads forming a general system, and on page 482 concludes the discussion with the following language:

"The cost of constructing and maintaining a portion of the railroad, and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue on which dividends are declared, is not based upon ~~similar~~ divisions of the road, but on the entire system."

It will be remembered that all of these roads and divisions are owned and operated by the same company, accommodating different portions of what may be called the same community, to-wit: Portland and its suburbs, and no reason is shown why one suburb should be favored over another, nor why the mileage basis for percentage of travel, even if the Court had based its decision solely upon that rule, would not have been just and equitable. The difference in cost of construction is immaterial. The evidence fails to show that the company will not receive as great revenue under the rates prescribed by the orders attacked in these cases, as it did at the time the orders were made. It does show that the difference in density of traffic is mainly caused by the discrimination created by the plaintiff. The operation of the trains is part of the way over the same track. The divisions and roads all belong to the same system and no conditions whatever exist to justify any particular difference in rates. As far as the testimony throws any light upon the question,

under the rates prescribed, the company will receive ample revenue, including good dividends, upon its investment.

Under the circumstances of these cases, the fact that the plaintiff had established a five cent fare from Lents and maintained it so long that it claims an immense revenue by virtue thereof, we submit is competent evidence entitled to more than ordinary weight in determining the fact as to whether a five cent fare should not be granted on the Milwaukie line for the same distance, and no error was made in applying the rule announced in the Menacho Word case.

The State Courts properly held appellant's own rates were the most convincing kind of testimony. The Court rightly found (Transcript of Record, Case 119, page 37) that:

"The evidence does not show that, considered by themselves, the charges of the plaintiff upon the Oregon City division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. Scott divisions, the charges of the plaintiff for transportation of passengers between First and Alder streets and the town of Milwaukie, are unjust and unreasonable."

(b) **Traffic Will Not Bear Rates Condemned.**

The right of the carrier to fix rates which will yield a fair return on its investment is qualified by the rule that it cannot exact fares higher than the service is reasonably worth to the public requiring the service, or more than the traffic will bear.

> Cotting v. Kansas City Stock Yards, 183 U. S. 79.
> Puget Sound Elec. R. Co. v. Railroad Commission, 65 Wash. 75, 83-87.

(Citing and quoting numerous Federal, State, and Editorial authorities.)

The evidence was overwhelming to the effect that the traffic will not bear the ten and fifteen cent rates charged; that whereas, the topography and soil are extremely favorable for the development of the Milwaukie and Oak Grove districts, the effect of excessive rates to those points and lower car fares in all other directions, has been to stunt the growth of the sections involved herein and impoverish their citizens. Lents and Mt. Scott have grown enormously. St. Johns has made wonderful increase in population. This is due to the cheaper car fare elsewhere, and the high rate charged on the Milwaukie line, and to nothing else. The growth of the Lents district is directly due to the five cent fare. The Traffic Manager of the plaintiff in error, Mr. Mulchay, so testified.

(Transcript of Record, Case 119, p. 115.)

Q. "Isn't it a fact that the travel on the (Mt. Scott Division) line was built up on account of the fact you gave a five cent fare to Lents?"

A. "That is true."

The Commission and Circuit Court both made this same finding.

The Milwaukie and Oak Grove districts cannot compete with these other favored localities. A reasonable rate is one which would give them the advantage to which their geographical situation, topography and soil and civic improvements, would entitle them. Neither the carrier nor the State can disregard these matters in fixing a reasonable rate. These districts have not prospered, and cannot prosper under existing rates. They are entitled to have as reasonable rates as other districts, within sight, and having similar conditions, receive. The traffic will not bear existing rates.

However, we claim that the Court need not go into the question of fact except to determine whether there is testimony to support the findings and whether the Com-

mission has abused its discretion; whether it exercised a reasoning as distinguished from an arbitrary discretion. This Court is not determining whether this or that rate is reasonable, but only considers whether the order is lawful; not whether, if it were sitting as a Railroad Commission it would make the same order, but it is determining whether constitutional rights have been invaded and whether the Railroad Commission of Oregon and the State Courts have made such an arbitrary use of power as to be an abuse of discretion.

It is not necessary, in the cases at bar, to examine into this question, because the particular rates must be considered in connection with the whole schedule, and it is evident the reduction, if any, is but an insignificant part of the total revenues of the company and will not operate to confiscate the property of plaintiff in error. Nor need this question be examined into, because the rates have not been put into effect, a temporary restraining order having been issued in both these cases, and this Court will not interfere unless it is shown beyond any question that there will be a reduction so unreasonable that the property of plaintiff in error will necessarily be confiscated. Nor will it be examined into, because the reductions being all single rates, and the effect of the whole schedule not being attacked by the pleadings, it is no concern of the plaintiff in error, that the Legislature of Oregon, through its constitutional agency, fixes rates to one group of points, which the plaintiff thinks too low, or which may even in point of fact, as to that rate be non-compensatory.

However, we submit, that from a careful and impartial consideration of the evidence, this Court will reach the same conclusion as did the Commission and the State, Circuit and Supreme Courts—that the rates charged are unreasonable, and the rates ordered substituted therefor are in fact reasonable.

(c) **Old Rates Were Unjustly Discriminatory.**

Some discussion of the facts may be helpful before taking up further questions of law. Prior to 1901, the Lents district had a ten cent fare, with the necessity of a change in cars. By the consolidation of the lines, a through route was made, and the fare was reduced to five cents. The Milwaukie and Oak Grove fares were respectively ten and fifteen cents and have never been reduced, although the citizens had given at least eighty acres of land and cash subsidies on the strength of the assurance that they were to have low fares.

The Commission had before it, among others, the following witnesses, whose testimony may be taken as typical. This testimony, by stipulation, is before this Court. It bears as well on the question of the reasonableness of the rates charged.

TESTIMONY AS TO LENTS (MT. SCOTT LINE).

Testimony of Mrs. Eaton: Have resided at Lents for the past eight years and was secretary of the school district during 1901, 1905 and 1906. In 1901, we had two teachers, ninety scholars. In Districts 1 and 12 (three miles long and three miles wide) in 1906 we had eight teachers and a school census of 505 children; in 1907, eleven teachers and 633 children.

(Transcript of Record, Case 120, p. 77.)

Testimony of O. R. Additon: I am a real estate agent and have resided at Lents for the past six years. 1901 there were two stores at Lents. Now there are four drug stores, one hotel, fuel company, bakery, hardware store, meat market, two restaurants, one livery stable, two blacksmith shops, one harness shop, shoe shop, band, several lodges, a ten-room school, and two water works, all of which have been established since 1901. In selling real estate, I represent to the purchasers of lots (which

are more numerously sold than acreage) as an inducement for the purchase of the same, that we have a five cent fare.

(Transcript of Record, Case 120, p. 81.)

Testimony of George A. Brodie: Have lived in the Lents district eighteen years. Was an officer and stockholder of the Portland, Chicago and Mt. Scott Railway Co. (the company which was a party to the "Lents Central"). The traffic on this road before it was turned over to the appellant's predecessor was very light. We had a car every hour which sometimes carried two or three passengers and sometimes not that many until late in the afternoon. The cars were never over-crowded. Since that time the traffic has been increasing considerably all the time. Now we have a fifteen-minute service, 120 to 130 passengers to the car, and cars crowded all the time.

(Transcript of Record, Case 120, p. 87.)

Testimony of J. J. Johnson: I was born at Mt. Scott (Lents district) and have lived in that community all my life. On April 30, 1901, this road was there and passengers were transferred from the Portland, Chicago and Mt. Scott Railway Co.'s cars to the cars of appellant's predecessor at Mt. Tabor Junction. Very soon after the 1st of January, they shut down the Mt. Scott road and did not run until about July, 1901. I was over at the farm on the 1st of February. The territory had greatly dwindled. There was no growth at all.

The main thing held out in the sale of property was the five cent fare. It was advertised on account of the five cent fare. Real estate agents advertised it as being five cent fare and I think, even on some of their posters, the five cent fare was put on as an inducement to purchase cheap lots. Of course, prior to that time it was a district, you might say, of brush all the way from Lents Station clear to town excepting one or two points. It seemed it was cleared off and it surprised all of us. Houses

went up in every direction. There were some few houses between Portland and Lents Junction. Then they put up store after store all the way out that line. It looks almost like a city.

(Transcript of Record, Case 120, p. 93.)

Testimony of A. W. Miller: Have lived one-half mile this side of Lents since 1898. In 1898 there was perhaps from fifty to seventy-five families in and around Lents, within a radius of a quarter of a mile each way. I took the census of the Lents district and the Woodstock district, comprising an area of six miles square, and the total population of the two districts in 1900 was 905 souls. I cannot give the population of each district separately.

(Transcript of Record, Case 120, p. 95.)

TESTIMONY AS TO OREGON CITY LINE.

Testimony of B. Lee Paget: I have lived at Center over a year and am president of the Oak Grove Improvement Association. I rode from Oak Grove to St. Johns and the Union Depot at different times and before I got onto the kinks, which I learned by experience, but not from the conductors of the company, I paid twenty cents in riding those distances each time. I paid fifteen cents to First and Alder streets and no transfer was or is allowed on that fare and from there to St. Johns I paid five cents extra and in returning the same charges were demanded, collected and received by the company. I am a director of the Oak Grove school district; the present school census is 70 pupils. The school census of pupils in 1903 was 63; 1904, 65; 1905, 80; 1906, 93 and in 1907 there were 98. We never had more than two teachers. We have no electric lights or telephones. My friends claim that the reason why they do not visit me is that the railroad fares are too high and that they cannot afford to: for instance, if a family of four were to come out from the city to visit me and my family at Center, it would cost about $2.00 for

street car fare. Street car fare for my family to Portland and return costs me $20.00 per month.

We have two small stores in our district and a majority of the people work or have business in Portland. I know of several who left Oak Grove on account of the high fares and have heard of others. We have had no appreciable increase in population since I have lived there. The increase of population and houses in St. Johns has been so great as to be the talk of the city, county and state, almost. Nickum (on the Springwater division) is quite a distance outside of the city limits and the cars to reach there go through a deep and expensive cut. The fare from Portland to Center is unreasonable. If we got the five cent fare, Oak Grove, Courtney and Center would get to be larger than Lents.

(Transcript of Record, Case 120, p. 97.)

Testimony of R. W. Crane: I am a real estate agent and have lived at Courtney two and a half years and still reside there. I am not selling much real estate, but have considerable listed at and about Oak Grove, Center and Risley. I have made an effort to sell it but cannot do so readily. The greatest complaint was that the car fare was too high. They all like the location and soil, however.

(Transcript of Record, Case 120, p. 118.)

Testimony of John F. Risley: I have liver near Center for the past forty-five years. My station is Risley. I own land near Oak Grove and have endeavored to sell it, but have failed because the people all said that the street car fare was too high.

(Transcript of Record, Case 120, p. 119.)

Testimony of Judge M. G. Munly: I am interested with others in land near Milwaukie Heights, Center and Oak Grove. We gave subsidies to this Oregon City line, also land and rights-of-way, and so did the other people

living along the line. We gave them twenty acres of our best land, worth at the least $225.00 per acre. **The consideration for these subsidies and donations was that they would build the line and give us good service and cheap fares.** This was in 1893 or 1894.

(Transcript of Record, Case 120, p. 121.)

Testimony of W. G. Starkweather: I am a farmer and school director and engaged in the real estate business and live near Center. I have lived there for the past thirty-five years. I have endeavored to sell real estate near Oak Grove, Courtney and Center, but experienced great trouble for the reason that the fares were too high. The people gave subsidies, rights-of-way, and donated lands to the company. Mr. Risley donated about twenty acres and so did a Mr. Knapp.

(Transcript of Record, Case 120, p. 123.)

Testimony of Henry Heitkemper: I have lived at Oak Grove, near Courtney, for the past eleven years. The growth has been small during that time, about twenty houses and shacks in all have been built. Land sells very slowly around there. The reason is that they kick on the high fare. The first charge was twenty-five cents for a round trip ticket and then they raised it to fifteen cents straight. When I first went there, they charged eight cents to Oak Grove. Rights-of-way were given to the company and twenty acres of land was given by Breyman, Merritt and Hyler.

(Transcript of Record, Case 120, p. 126.)

Testimony of Thomas Howell: I have lived at Center Station in Oak Grove for the past five years. I own a small lot on Center avenue and run a merchandise store at Oak Grove. I was postmaster there. I counted up the population. I circulated a petition to be appointed postmaster and the government required me to make a close

estimate of the number of inhabitants within the delivery of the postoffice. The number was 300. There were two small stores in and about Courtney and Risley. There has been some sale of real property, but property has not been sold readily or easily. Some people have left on account of poor service and high fares. I have tried lately to sell real estate, but could not on account of the excessive fares. Good land is held at $500.00 an acre.

(Transcript of Record, Case 120, p. 127.)

The same character of testimony as above was given by a number of witnesses in regard to the growth of population, real estate values and the difficulty in selling lots around Milwaukie; also, testimony showing that the soil around Milwaukie and the Oak Grove district was very fertile and rich and would produce anything, while the soil around Lents and in the Lents district was gravelly and unproductive. That at the time the Lents contract was made land around Lents and in the Lents district was selling for about $100.00 an acre, while now it is selling at the rate of from $300.00 to $500.00 a lot, and the land around Milwaukie and in the Oak Grove district at the time of the execution of said contract was selling for about $500.00 an acre, and that now the values of real estate are about the same as then and the growth of Milwaukie and Oak Grove and the Oak Grove district has remained practically at a standstill, and that the reason of this is that the people who would naturally locate and purchase land and build homes on the Oregon City division were diverted therefrom on account of the five cent fare to the other branches of appellant's system, to-wit: Mt. Scott branch, Springwater branch and the St. Johns branch.

The evidence shows that these places and their real estate values are increased mainly by reason of the five cent fare; that any discrimination in fares in favor of one place against another builds up and increases the value of the property and the population in the favored places

and stagnates the growth of and value of the real estate of those places discriminated against; that there is a constant rivalry between the inhabitants of these places in building up their respective localities and towns, in increasing the value of their real estate, and in protecting the interests of the inhabitants thereof; that the population of Milwaukie and Oak Grove and the value of real estate in said places are about the same as they were seven years ago; that Lents, and the Lents district from the city limits to Lents, and the real estate thereabout, has increased in population and value to a wonderful extent.

That the street car business between Lents and Portland was built up from nothing to a paying basis on the five cent fare, and the same can be reasonably expected for those places on the Oregon City branch if the five cent fare is granted to them. If this five cent fare is granted to the people on the Oregon City branch, it will result through increased travel in a greater benefit to the company than did the five cent fare to Lents. That this unjust discrimination has had the effect of injuring Milwaukie and Oak Grove and the other places on this branch, both relative and actually, decreasing the value of the real estate in these places and retarding their growth.

Can this Court, from a consideration of the testimony, say that the Commission "abused its discretion," or that the order "shocks the conscience of the chancellor," or that the Commission has "not used an honest or reasonable discretion," or that it is not a subject as to which "reasonable men might differ" in the conclusions reached? Defendant in error is confident that if this Court feels it to be in its province to examine into this voluminous record—which we think is under the law unnecessary except to answer the questions propounded in this paragraph—it will reach the same conclusions as to the facts that were reached by the Commission and both the State Courts, with the witnesses before them, and

with a full personal knowledge of all the surrounding conditions, and after a more full argument than this Court can consistently take the time to listen to.

Passenger fares are legitimately classified according to the relation they bear to the development of traffic and tributary territory, and the ensuring of a constant income to the carrier. Suburban passenger traffic should be treated with especial liberality and accorded very low rates. Prosperous and populous suburbs contribute very profitably to the traffic of the carrier; suburban passengers are wholesale and permanent purchasers of transportation and are entitled to special consideration on that account. Not only the interests of the carrier, but sound public policy demands this. The healthy growth of the urban community demands a constant and healthy growth of the suburbs. More than this: public policy demands equal treatment of suburban districts. It is for the best interests of all, including the carrier, that the suburban growth should be symmetrical, normal and equal, in order that congestion may be avoided and development be made of all outlying land to the best advantage. No greater injustice can be perpetrated by a suburban carrier than to discriminate between its branch lines in such a manner as to build up one "like a city all the way along" and to prohibit the development of the other, through favoritism, for a pecuniary consideration, or even though the shortsightedness of its traffic managers or for real estate inflation.

(d) The Findings of the Commission—Defenses Urged.

The Oregon Commission found the existing rates were unjustly discriminatory (1) against the localities of Milwaukie and Oak Grove, and (2) against the individual inhabitants of those localities and persons using the company's line to those points.

The burden is on the company to show that the Commission's findings and order are unlawful; and appellant

may do this by showing the Commission made a **clear error of law** in applying the facts and reaching the conclusion that there is unjust discrimination, or that it abused its discretion in passing on the facts.

The company contended in the State Courts (1) that the Railroad Commission Act in no wise prohibits it from discriminating, justly or unjustly, between localities, and that at common law, it may discriminate unjustly between localities; (2) that the existence of the "Lents Contract" creates a dissimilar condition, so as to justify a discrimination, and (3) that the traffic is so much greater over the Mt. Scott (Lents) and Springwater divisions that it is not unjust to discriminate against the Milwaukie-Oak Grove line by charging materially higher fares for equal distances hauled. We will take up these defenses.

(e) Discrimination Between Localities.

Plaintiff in error contends the Oregon law in force when the orders of the Commission were confirmed did not authorize a regulation of fares in consequence of a discrimination against any locality, but only when a difference in charges was made to passengers for like and contemporaneous service; and the order of the Commission and decrees of the State Court affirming the same were therefore in excess of statutory authority and void.

It will be observed the question as to whether discrimination between localities is forbidden by the Oregon Railroad Commission Act, and its regulation entrusted to that tribunal, is entirely as to the construction of a State statute. No federal question is here presented.

After a painstaking examination of the statute and a cogent and unanswerable statement as to its reasons, the State Supreme Court held that "plenary power to correct discrimination as to localities was impliedly granted by the original (Railroad Commission) Act, and hence the orders undertaken to be set aside are not void for want of jurisdiction." (56 Or. 477.)

Right or wrong, this decision is binding upon this Court and will not be re-examined. Our contention renders analysis of the Act unnecessary in this respect, but if the Court deems it essential to go into this question, the essential portions of the Act are set out in the opinion, 56 Ore. 473, 477.

IV.

DISSIMILARITY IN CONDITIONS.

(a) Plaintiff in error relies upon the dissimilarity in traffic and population of the territory served to justify its discrimination against Milwaukie and Oak Grove and their inhabitants.

Under the Oregon Railroad Commission Act, as construed by the Supreme Court of that state, the dissimilarity in traffic and population of the territories served does not justify a discrimination against the localities involved in these proceedings. Argument to this effect by plaintiff in error, therefore, is beside the mark.

Section 48, of the Railroad Commission Act (Laws of 1907, Chap. 53) makes it an offense for the railroad to collect for carrying one person more than it demands from another "for a like and contemporaneous service." It will be noted that the unjust discrimination section of the Railroad Commission law of Oregon cited differs from Section 2 of the Federal Act to Regulate Commerce, in that the latter section contains the expression: "under substantially similar circumstances and conditions," which is omitted in the Oregon Act. In the case before the Supreme Court below, the plaintiff in error, there appellant, contended that such phrase, "under substantially similar circumstances and conditions" was reasonably implied in the Oregon enactment in construing what should be held to be unjust discrimination, and that there could be no "like service" unless it was for carriage over

the same line, and hence the difference in charges for transporting persons over another branch of the plaintiff's railroad was not prohibited nor unjustly discriminatory. Answering this contention the Supreme Court of Oregon (56 Oregon 481) said:

"The Legislative Assembly of this State, in framing section 48 of the Railroad Commission Law, patterned it somewhat after section 2 of the Interstate Commerce Law and it would seem that the phrase 'under substantially similar circumstances and conditions' has been purposely omitted from our enactment. This act of Congress was designed to correct unjust discriminations in charges for the transportation of passengers and freight from one state or territory to another, while our law is applicable only within the state of Oregon. * * * These facts were undoubtedly considered in framing section 2 of the Interstate Commerce Law, and induced the insertions therein of the phrases 'a like and contemporaneous service' and 'under substantially similar circumstances and conditions,' the latter of which seems purposely to have been omitted from our law under subject. The absence of such clause from our statute leads to the conclusion that the phrase, 'a like and contemporaneous service,' as employed therein, is not limited to transportation over the same line, but extends to service rendered on other lines operated by the same railway company, and particularly so when electric cars are used on urban, suburban, or interurban railroads. The cost of constructing and maintaining a portion of a railway, and the volume of business on one part of a line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based upon particular divisions of the road, but upon the entire system." (56 Oregon 481-482.)

Plaintiff in error also insisted in the Supreme Court below that the cost of constructing the Mount Scott Division (the favored line) was 50 per cent less than the Oregon City Division (upon which the points Milwaukie and Oak Grove are situated), and that the number of passengers on the Oregon City Division, north of Milwau-

kie was less than one-twentieth of those on the Mount Scott Division, and that the service performed was so dissimilar, and rendered under such diverse circumstances and conditions, as to make the difference in fares between Lents and Portland and between Portland and Milwaukie, and also between Portland and Oak Grove, not unjustly discriminatory against the latter towns.

The Supreme Court of Oregon pointed out that the five cent rate of transportation for a continuous trip in one direction between any two points within the city of Portland extended by compulsion to the boundary of that city (Section 2096 B. & C. Comp.), where the second district of rates begins unless the first is voluntarily continued beyond that section. Applying the construction found by the Supreme Court of Oregon to be given to Section 48 of the Railroad Commission Law, that Court further held that the zones of fares should be computed along the lines running outward from the city boundary (56 Oregon 480). The lower court held that inasmuch as the plaintiff in error had agreed to accept the fare of five cents for carrying passengers between Portland and Lents, the latter point being a considerable distance outside the boundary of the city of Portland, it had thereby asserted the value of the employment so rendered, and by that measure the Railroad Commission law required it to be governed for similar service on the Oregon City Division for an equal distance beyond the boundaries of the city of Portland. (56 Oregon 483.) Not only had the plaintiff in error voluntarily extended its five cent zone a distance of 3.51 miles beyond the city limits to Lents on its Mount Scott Division, but it had also carried the five cent rate a distance of .56 mile outside the city limits from Portland to Nickum.

We submit that under the construction of Section 48 of the Commission Act as given us by the highest court of the State of Oregon, it is not incumbent upon this Court to enter upon an examination of the question as to whether the traffic and population of the territories served

on the respective lines of the plaintiff in error involved herein justify the discrimination which has been practiced against Milwaukie and Oak Grove and their inhabitants. The construction of the Railroad Commission Act by the highest court of the state which enacted it, is of course binding upon this court, and when the law is so settled, then the question as to whether the facts in the particular case constitute a discrimination which the law forbids is a question of fact which it is not incumbent upon this Court to re-examine.

(b) In considering whether the discrimination is justified, we observe that plaintiff in error may not avail itself of conditions which are the result of the discrimination complained of. When the discriminatory rates were given Lents, the conditions now existing were reversed, and the discrimination was given in spite of the reasons now advanced to justify it. Further, the difference in traffic and population relied upon will be elminated by an enforcement of the Commission's order.

The reasonableness of the rates has nothing to do with the question as to whether they are discriminatory; the Oregon legislature has forbidden rates which are unjustly discriminatory, as well as rates which are unreasonable. Reasonable charges may constitute an unjust discrimination or create an unlawful preference. It is enough to show that the company carried at a lower rate for the same or a similar service.

Scofield v. Railway Co., 43 Ohio St., 571-615.

Interstate Commerce Commission v. East Tenn. Ry. Co., 85 Fed., 107-114-115.

State v. Minneapolis Ry. Co., 80 Minn. 191.

Cordele Machine Shops v. L. Ry. Co., 6 I. C. C. Rep. 361.

Great Western Ry. Co. v. Sutton, 4 Eng. & Ir. App. 226.

Kinnavey v. T. Ry. Assn., 81 Fed. 802-804 (bottom).

Interstate Commerce Comm. v. Cinn., etc., Ry. Co., 167 U. S. 479, 511.
Board of Trade v. Ry. Co., 6 I. C. C. Rep. 632, 645.
Beale v. Wyman, R. R. Rate Reg., Sec. 839.

The State Supreme Court has given the Act of the Legislature of the State this interpretation (56 Ore. 487), and here again the decision of the State Court is controlling. It is, therefore, to be taken as settled that the law of that state forbids charges which are "in any respect unreasonable **or** unjustly discriminatory." (Id.)

(c) Preference of one locality over another without a lawful excuse is in and of itself an undue and unreasonable discrimination.

N. Y. P. Ex. v. Baltimore & O. Ry. Co., 7 I. C. C. Rep. 613, Syll. 2, 659.

First: Differences in circumstances and conditions of transportation that are of the carrier's own creation or connivance or that by a reasonable effort on his part might have been avoided, cannot justify a discrimination in rates.

East Tennessee & G. R. Co. v. Interstate Com. Comm., 181 U. S. 18, 20.
Business Men's Assn. v. Chicago, etc., R. Co., 2 Interst. Com. Rep. (double column ed.) 41, 46; 2 I. C. C. Rep. (single column ed.) 52.
Rice v. Western N. Y. Ry. Co., 3 Int. Com. Rep. (double col.) 162; 3 I. C. C. Rep. 87 (single column ed.).

Says Mr. Justice White, in East Tennessee & G. R. Co. v. Interstate Com. Comm., **supra** (pp. 18, 20 of opinion):

"The prohibition of the third section, when that section is considered in its proper relation, is directed against

unjust discrimination or undue preference arising from voluntary and wrongful acts of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions **wholly** beyond the control of such carriers. * * * There may be cases where the carrier cannot be allowed to avail of the competitive condition, because of the public interests and the other provisions of this statute, is of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency toward unreasonable rates on other business would arise from the carriage of traffic at less than cost of transportation to particular places."

This is just what the street car company did. When the discrimination was commenced, and for some considerable time afterwards, plaintiff in error claims it carried people to Lents at a loss, and if so the loss had to be made up out of the other lines, including the Oregon City division. So with the Springwater division. The Lents line, they now say, is a paying line. That fact, having its origin, as it did, cannot be availed of as a dissimilarity in circumstances to justify this discrimination.

Second. At the time the contract was made and the railroad company began to discriminate the volume of business was in favor of Milwaukie and Oak Grove and their respective districts, hence the discrimination was not then justifiable under the theory now advanced by plaintiff in error.

Mr. Miller, inspector on the lines of plaintiff in error and formerly conductor on the Mt. Scott line, a witness for the plaintiff, testified and said as to traffic on the Mt.

Scott line: **"I know five years ago we handled it with two cars."** (Miller's testimony, Case 119, record, p. 122.)

At that time, Milwaukie had a population of about five hundred and Lents a population of about fifty. Milwaukie and Oak Grove district had a population of about two thousand and Lents district of about fifty to seventy-five families within a radius of one-half mile on each side. Now, the population of Milwaukie is about seven hundred and Lents proper about five hundred; Milwaukie and Oak Grove districts have a population of about two thousand and Lents district a population of about ten thousand.

The evidence shows that the natural advantages of soil and location now are and were prior to the Lents contract in favor of Milwaukie and Oak Grove and the places on the Oregon City branch; that the population and the price of real estate were in favor of said places prior to the five cent fare to Lents. Notwithstanding this, Lents and its district has outstripped Milwaukie and Oak Grove and their districts, as aforesaid, and the value of real estate at Lents and in the Lents district has increased from $100.00 per acre to $2,500 per acre and over. While thousands have settled along the Mt. Scott line, families have found the fare to Oak Grove too high and have had to move where there was cheaper fare.

What caused this great increase in population and real estate values in Lents? Numerous witnesses, and even Mr. Mulchay, traffic manager for the plaintiff in error, tell us that it was the effect of the five cent fare. (Mulchay's testimony, p. 148.)

This was the result of the very act of plaintiff in error complained of, which it has no right to take advantage of as a defense. (Authorities cited.)

The fact that the five cent fare was granted at a time when the volume of business at Milwaukie and its district exceeded the volume of business at Lents and its district and the places on the Springwater division, proves the volume of business had nothing to do with the inception of the five cent fare.

Third. But, is the volume of business from Lents station, and from Gates and Jenne greater than the volume of business from Milwaukie and Oak Grove?

The great volume of business on the Mt. Scott line is from Hazelwild to the city boundary. (Miller's testimony, Record Case 119, p. 119.) Between Lents and Hazelwild, a distance of 1.65 miles, the volume of business is no greater than the volume of business between the city limits and Milwaukie. (See the testimony of Miller, pp. 119, 120, Case 119.)

As to the volume of business between Gates and Jenne as compared with the volume of business between Oak Grove and Center it is conceded by plaintiff in error that there was no substantial difference.

Therefore, the volume of business has nothing to do with the **maintenance** of the five cent fare, any more than it had with the inception of the rate.

Counsel claims that the five cent fare to Nickum is not discriminatory because appellant cannot establish a **depot** at the city boundary on account of the track being on a fill. If the law makes the city boundary the basis of the five cent fare, why change it and make Nickum, three-fourths of a mile beyond, the basis? The company can charge the people at Nickum five cents for riding from the city boundary to Nickum just the same as the people of Milwaukie five cents from the city boundary to Milwaukie or vice versa. Why should the establishment or non-establishment of a depot building at the city limits prevent the plaintiff from charging a fare of ten cents from First and Alder streets to Nickum? The cost of the road from the city boundary to Nickum is five times the cost of the road from the city boundary to Milwaukie. (Fuller's testimony, Record Case 119, pp. 154, 157.) If, based upon the cost of the road, the fare to Nickum would be greater than to Milwaukie.

Lents, Jenne, Gates, Nickum, St. Johns, Milwaukie and Oak Grove are suburbs of the City of Portland. The bulk of the population of these places works in the City of

Portland, sends its children to the schools of the city, and travels on the lines of the plaintiff's road.

The making of Lents and Nickum the basis of the five cents fare instead of the city limits is unlawful and wrong and the appellant, according to its own showing in transporting passengers from the city limits to Lents, a distance of 3.51 miles, for nothing, and from the city limits to Nickum, a distance of over one-half mile, for nothing, and from the city limits to Jenne, 8½ miles, for ten cents, is guilty of a gross, unjust and unreasonable discrimination against Milwaukie and Oak Grove, on the Oregon City line, whose residents the appellant charges for the same service five cents and ten cents, for transportation from the city boundary—1.35 miles and 3.12 miles, respectively.

Mr. Mulchay testified (Case 119 p. 114 ~~Transcript, pp. 147 and 148~~):

We use the city limits as a base for grouping suburban rates beyond; are compelled to accept only five cents within the city limits, therefore base the groups outside the city limits as from the city limits.

Q. Will you please tell the court why it is you do not charge anything from the city limits to Lents other than a five-cent charge from Portland to Lents? Just explain then how you harmonize with the city limits as a basis.

A. In the case of Lents it is not harmonious. Therefore, the company is carrying people according to that from the city limits to Lents for nothing, a distance of 3.72 miles, and is charging the people who travel from Golf Links (city limits) to Milwaukie five cents, a distance of less than 1½ miles, and people to Oak Grove and Risley, about three miles, ten cents.

We contend that the service, transportation of passengers, is the same. The Commission has found that the volume of business and the difference in the cost of these branches are not controlling factors which would warrant any such discrimination; and it being a question of fact

and free from fraud and error of law, the order should stand and not be disturbed. Appellant has no vested right to discriminate; rights obtained and contracts made which violate public policy and the police power of the State are not such rights and contracts as are contemplated by the constitution.

The consideration for the Lents contract was no greater than the subsidies paid on the Oregon City line, and regardless of this, the difference in fares has far more than compensated the company. If it could be shown you would find that the excess fares charged the people of Milwaukie and those living on the line in the Oak Grove district, from the date of the Lents contract would pay for the building of four roads like the one turned over to appellant by the Portland, Chicago & Mt. Scott Ry. Co. in consideration of the five-cent fare.

The Milwaukie-Oak Grove line was cheaper to build, is more level, has fewer curves, requires fewer cars to operate, and is a much less expensive line to maintain than the Mt. Scott or Springwater line. (See testimony of Streib, p. 229, Case 119.)

One of the most astonishing propositions advanced by counsel for appellant is that appellant has the right to make a contract with the Portland, Chicago & Mt. Scott Railway Co. for a reduced rate—5c (which creates an unreasonable and unjust discrimination against the people and places on the Oregon City branch) and that appellant may then build the Springwater branch between the two other branches and may cause the Mt. Scott and the Springwater branches to compete with each other, in consequence of which the fare on the Springwater branch is reduced to meet the fare on the Mt. Scott branch. Appellant creates an unjust and unreasonable discrimination against the people and places on the Oregon City branch, and then undertakes to justify this discrimination on account of this same competition. This is clearly an act of their own creation and a violation of the act of 1907.

The whole "house that Jack built," (Complaint, Par. XIV-XVI), is based upon this contention and hypothesis. Equally astounding, from a traffic standpoint, that because the fare from Lents Junction to First and Alder streets over the Mt. Scott line is ten cents, that has to be the basis for all intermediate points between Lents Junction and First and Alder streets on the Springwater line. Fares to local points are not, in practice, or necessarily, made by using a short distance through line rate as a basis. The company may well say, "If you use the short line, the hypothenuse of the triangle, we will carry you for ten cents; if you want to go over the other line, around two sides of the triangle, you'll have to pay the ordinary fare on that line, and we decline to let the short line disarrange our local fares on the long line." Certainly if it voluntarily makes such an arrangement it ought not to complain if the State requires it to afford other localities and passengers on other lines the same rates. The Hill lines have a short line from Portland to Spokane (via North Bank) which corresponds to the Mt. Scott division; also a longer line from Portland to Spokane via Puget Sound, which corresponds to the Springwater division. The fare between Portland and Spokane is the same either route, but not a single **local** rate in or out of Spokane or Portland is affected a penny, and the company insists on restrictions which prevent the use of the through rate for local purposes. Similarly the Harriman lines at times make the same rate from the Missouri River to Willamette Valley points via either the O. R. & N. or Shasta Route; and the Southern Pacific makes the same rates to Portland from McMinnville via the west side or Yamhill divisions—yet not a single local passenger fare is disarranged. The inability of appellant's passenger traffic department to meet a very simple and common situation like this is not, as a matter of law, a justification of this unjust discrimination. So with the giving of transfers. Two passengers board the car going into Portland, from Oak Grove; one pays fifteen cents fare,

asks for a transfer, and is refused. He has to pay five cents more for his ride to the place where he works, or goes to school. Total, twenty cents. The other pays ten cents fare to the city limits and then pays five cents from the city limits in, asks for a transfer, and gets it, good to any point in Portland. Total, fifteen cents. The consequence is that a man who is "initiated," as Mr. Paget testified, pays his fare in two installments and gets his transfer, while the man who is not initiated pays five cents more for his want of knowledge. Appellant has an idea that by an interurban passenger paying his fare to the city limits and then from the city limits in, he becomes a "city passenger," whatever that may be. But such action can no more change the status of a passenger, as an interurban passenger, than paying a fare to the State boundary and then on makes a man a state as distinguished from an interstate passenger. It is really a useless, meaningless, unreasonable piece of red tape, and ought to have been cut out by the company without bothering the Commission or courts. This is one of the "devices" forbidden by our act.

We desire to call the Court's attention to the fact that in all the cases cited by appellant in the State Court, with the exception of one, the dissimilar circumstances and conditions were the result of competition, and doubtless the same cases will be cited in this Court.

In the cases before us the element of competition, the most powerful factor in rate-making, is absent.

The Supreme Court, in the case of I. C. C. v. Alabama Midland Ry. Co., 168 U. S. 144, held: "That any competition which is controlling on rates and traffic produces in and of itself a dissimilarity of circumstances and conditions."

In conclusion on this point, we desire to say, that the respondents do not want one atom of property belonging to the appellant or any railroad. A contract between the State and a railroad company, if not contrary to public policy and the laws of the State, should be inviolate. It

ought not to be touched by hostile hands. On the other hand, the people have rights as well as the railroad companies, and the rights of the people are or ought to be as sacred as theirs.

In these cases the rights of the people have been grossly violated and they are undertaking to compel the railroad company to right the unjust impositions placed upon them.

V.

FINDINGS OF FACT BY COMMISSIONERS NOT SET ASIDE BECAUSE COURTS MIGHT DIFFER.

The courts do not set aside the action of the Commissioners because they do not agree with the latter on the question of fact decided. They only set aside orders when the Commission has exceeded its jurisdiction by acting where the statute has not given it the power to act, or where it has not acquired jurisdiction over the railroad, or has made its findings without any support in the evidence or laws, or has abused its discretion so its orders "shock the conscience of the chancellor," or where the legislative act resulting from the joint action of the legislature and Commission violates a constitutional guaranty. No cases are found where the courts have set aside a particular rate fixed by a Commission because in fact unreasonable, when based on substantial, although conflicting testimony.

Illinois Central R. Co. v. Interstate Com. Comm., 206 U. S. 441, 459, and cases cited.

Cincinnati, H. & D. R. Co. v. Interstate Com. Comm., 206 U. S. 142, 154.

Spring Valley Water Works Co. v. San Francisco, 82 Cal. 286, 306; followed in San Diego L. & T. Co. v. National City, 174 U. S. 739; same v. Jasper, 189 U. S. 439, 441.

Steenerson v. Great Northern R. Co., 69 Minn. 353, 376, 410.

Jacobson v. Wisconsin M. & P. Ry. Co., 71 Minn. 519, 529; affirmed in 179 U. S. 287, 301.

International, etc., Co. v. R. R. Commission, 86 S. W. (Tex. Ct. App.) 16, 17; affirmed 89 S. W. (Tex. Sup. St.) 961.

Morgan's, etc., R. Co. v. R. R. Commission, 109 La. 247, 265.

In re Auburn & W. Ry. Co., 55 N. Y. Supp. 895.

People v. Board of R. R. Commrs., 65 N. Y. Sup. 597, 599.

In re Amsterdam, 33 N. Y. Supp. 1009, 1010.

Storrs v. Pensacola R. Co., 29 Fla., 617, 11 So. 226, 230.

State ex rel. v. Seaboard Air Line R. Co., 37 So. (Fla.) 314, 319.

Minneapolis St. P. & S. Ste. M. R. Co. v. R. R. Commission, 116 N. W. (Wis.) 905, 913.

Railroad Commission v. American Tel. & Telg. Co., 212 U. S. 414, 420-421.

Any other conclusion would overwhelm the courts with appeals from such administrative tribunals, and cast upon the judiciary a burden which it is not permitted, constitutionally, to perform. Something may be entrusted to other branches of the government than the judiciary.

Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 598.

Further, the rule is well established by this Court that on error to a State Court in a chancery case, as in a case at law, when the facts are found by the court below this Court is concluded by such finding.

In Vol. 1 Encyclopedia of the U. S. Supreme Court Reports, page 781, after discussing the rule in actions at law and in chancery, the rule is laid down as follows:

"Not only the very nature of a writ of error, but also the rulings of this court from the beginning make it clear that on an error to a State Court in a chancery case, as in a case at law, when the facts are found by the court below this court is concluded by such finding."

And many decisions of this Court are cited in support of the proposition. We revert to and take excerpts from only a few:

"No point has been more repeatedly and authoritatively settled, than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below and as they are exhibited by the record."

United v. King, 7 How. (U. S.) 832, 865, approved.
Dower v. Richards, 151 U. S. 658, 666.

"The findings of fact by the trial court and by the Supreme Court of the State are, in this writ of error, conclusive upon us."

Hedrick v. Atchison, Topeka & Santa Fe Ry. Co., 167 U. S. 673, 677.

"In this court we are concluded by the findings of fact made in a State Court in a suit in equity as well as in an action at law."

Bement v. National Harrow Co., 186 U. S. 70, 83.

"It has often been held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest courts of the State upon a pure question of fact, although a federal question might arise if the question of fact were decided in a particular way."

Israel v. Arthur, 152 U. S. 355, 362.

"True it is that in Dower v. Richards the court (referring to the dictum in Republican River Bridge Co. v. Kansas Pacific Ry., 92 U. S. 315, 317) treated as open for further consideration the question whether in chancery cases the power existed in this court to review the de-

cision of State Courts upon both the law and fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning make it clear that on error to a State Court in a chancery case, as in a case at law, when the facts are found by the court below this court is concluded by such findings."

Egan v. Hart, 165 U. S. 188, 189.

These cases, and the cases cited, are sufficient, we think, to establish the proposition that this Court will not review the findings of fact as made by the State Courts, and hence will attempt no further discussion thereof.

VI.

THE LENTS CONTRACT IS NO DEFENSE TO UNJUST DISCRIMINATION.

While we are not sure that the plaintiff in error will rely upon the arrangement made between the Portland, Chicago & Mt. Scott Railway Company and plaintiff's predecessor whereby the people of the Lents district obtained a five-cent fare, we will briefly discuss the propositions relative thereto.

Whenever a contract is made an instrument for creating and perpetuating a discrimination as unjust as that involved in the cases at bar, we submit that such contracts cannot be used as a shield to protect the company in such discriminations, for the following reasons: (a) The very action of the Commission now being reviewed was in contemplation of law a part of that contract; and, (b) If construed otherwise, the contract is now void as against the police power of the state.

(a) When said contract was executed both parties had voluntarily become common carriers and had assumed the duties which the law imposes upon a business clothed with a public interest. In the absence of a contractual waiver of the right to regulate, the state reserves as a

continuing right the regulation of the business of a common carrier to prevent extortion and to secure to its citizens the fullest justice and equity both of charges and services. Whenever a carrier does a business which the State might properly do itself; it is a governmental agency for public purposes, although owned individually.

Talcot v. Pine Grove Tp., Fed. Cas. No. 13,735, Vol. 23, (affirmed 19 Wall. 666) pp. 660-1-2-3.

"Such corporations are incorporated not for mere private ends, but in view of the public good they subserve. * * * In all these enterprises there is a mingling of both public and private benefit and the interests of the public are not to be sacrificed to mere private gain."

Holloday v. Patterson, 5 Ore. 177.
Ford v. Oregon Electric Co., 60 Ore. 278, 286.

Contracts such as the "Lents contract" involved in these cases are subject to the subsequent exercise of the police power.

Fitzgerald v. Grand Trunk Ry., 13 L. R. A. 70.

When a railroad contracts with the public concerning a matter which affects the public health, safety and welfare it does so subject to the subsequent exercise of the police power, which does not thereby impair the obligation of the contract.

C. B. & Q. Ry. Co. v. Nebraska, Ex Rel Omaha, 170 U. S. 57-72.

One whose rights, such as they are, are subject to State restriction, cannot remove them from the power of the State by making a contract concerning them, and the contract carries the infirmity of the subject.

Hudson Water Co. v. McCarter, 209 U. S. 349; 28 Supreme Court Reporter, 529.

The regulation of the business of a carrier which may be necessary today may not have been necessary yesterday, and may be either inadequate or unnecessary tomorrow. But the forbearance of the legislature to regulate yesterday confers upon the carrier which is occupying a sort of public office, an arm of the government itself, no right to contract so as to bind the State that today or tomorrow the legislature will not interfere and exercise its right to regulate intrastate commerce. In order to claim a contractual waiver, plaintiff in error must point to some statute of the State expressly, or by necessary implication, making the waiver, and none exists, or did exist, in this State when this contract was made. The law of this State was that the business in which these carriers engaged was clothed with a public interest. They were also occupants of the public highway of the State, charging tolls for its use. These companies exercising attributes of sovereignty in the conduct of their business, the State, for the good of all concerned, at all times reserved to itself the full power of regulation, to prevent extortion and unjust treatment and to secure the most beneficial use of its public highways. The right of the State to regulate is a continuing right. These principles were the law when the "Lents Contract" was executed, and are now the law.

It is, we submit, a familiar principle that the whole **corpus** of the existing law must be read into every contract. The parties to said contract must be held to have had in mind the fact that the legislature might at some time during the life of the contract exercise its theretofore unused rights to prevent discriminations between localities and individuals; and when the legislature uses such right, it does not thereby impair the obligation of a contract, because the very regulative act of the legislature was a tacit part of the contract itself.

C. B. & Q. Ry. Co. v. Nebraska, Ex Rel Omaha, 170 U. S. 57-72.

Fitzgerald v. Grand Trunk Ry. Co., 13 L. R. A. 70, and 209 U. S. 349; all before cited.

Both the Mt. Scott company and plaintiff's predecessor, and plaintiff itself, were formed under the general laws of Oregon, and hence their corporate rights and powers "may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights." (Article XI, Section 2, Oregon Constitution before amendment.) This reservation on the part of the State must necessarily be considered as written into the charter of each of said companies and into every contract made by them.

Therefore, when by general law the State forbids discrimination which may have been lawful theretofore, it is merely exercising a power which it reserved to itself in creating the corporations. The right to discriminate is not a "vested corporate right," because the manner in which the carrier shall conduct its business with the public is essentially a public matter and the corporation is to that extent a mere agency of the State.

McCandless v. Richmond & Danville R. Co., 38 S. C., 103.

Southern Wire Co. v. St. Louis, etc., R. Co., 38 Mo. App. 191.

(b) Such a contract cannot hamper the police power of the State.

N. Y., N. H. & H. Ry. Co. v. Interst. Com. Comm., 200 U. S. 361-395.

People v. Hawley, 3 Mich. 330, 342.

Bridge Co. v. Bunnel, 4 Conn. 54.

In re O'Neil, 41 Wash. 174.

Regulation of railroads is part of the police power of the State.

State v. Mo. Pac. Ry. Co., 92 Pac. (Kan.) 606-611.

In Atchison v. Ritchie, 10 East. 530, Lord Ellenborough said in the opinion, page 534:

"That no contract can properly be carried into effect which was originally made contrary to the provisions of law or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt."

That a contract valid at the outset may become void whenever in the process of time, owing to changed conditions, its execution results in the violation of an act to regulate commerce.

N. Y., N. H. & H. Ry. Co. v. Interst. Com. Comm., 200 U. S. 361.

Armour Packing Co. v. U. S., 153 Fed. 1-18; affirmed 28 Supreme Court Reporter 428, 435.

Bullard v. Northern Pacific R. Co., 10 Mont. 168-185.

Church v. Minn. St. L. Ry. Co., 14 S. D. 443.

These discriminations in favor of the Mt. Scott and Springwater divisions against the other lines grow out of the Lents Contract, the consideration for which was the furnishing of a facility now used by appellant in transporting passengers to Lents. This is prohibited by the latter paragraph of Section 48 of the Oregon Act.

The Oregon Act, as has been shown, is broader than Section 3 of the Interstate Commerce Act. The provision just quoted was not found in the Interstate Commerce Act. It is intended to cover just such cases as the Lents Contract and the contract in the case of Root v. L. I. R. Co., 4 L. R. A. 331. Subterfuges of this kind—"devices," they are called in the act—used by railroads to defeat the beneficent intent of the statutes led to the enactment of the Elkins law, passed on in the Armour case, **supra**, and to the provision in Section 49, quoted above. The trackage furnished by the Lents people is a facility, just the

same as the warehouses in the Root case, where a side or additional track connected two railroads.

The Bullard case and the Armour case are practically the same as the Lents case. In these two cases the contracts entered into by Bullard and Armour with the railroad companies created dissimilar circumstances. This is the same as the Lents contract does, as claimed by plaintiff, and yet the court in both instances held that these contracts violated the act and were unlawful and void. The Circuit Court, speaking in the Armour case (153 Fed. 1, 18) said: "It is true in the cases last cited that the contracts were made after the higher rates had been filed and published, but the Elkins act declares the **receipt** of the concession from the rate filed and published after the execution of such contract to be illegal in the same terms as it does that from a rate filed and published before the contract is made, since it declares the receipt of every concession from the filed and published rate illegal." And because the collection and receipt creates the unjust discrimination and undue prejudice against the people and the localities on the Oregon City branch, it violates Sections 48, 49 and 55 of the Oregon Act.

At the time the Lents Contract and the contract in the Root case were executed, Section 48 of the Oregon Act, as above quoted, and the Elkins Act were not in force. The Elkins Act was not considered in the Root case and had it been in force the court could not have held other than was held in the Armour case and the Bullard case. The court, speaking in the Bullard case, said (10 Mont. 185):

"If the contract mentioned in the complaint has been fulfilled, it is plain that after the act of Congress became effective and during the period specified in the pleadings there would have been a discrimination in favor of the respondent by the appellant in the sum of $595.95 on account of the transportation of his goods. In other words, the patrons of the N. P. R. Co. who had no special agreement would pay this same amount for the same services in

excess of what would have been demanded of the respondent. It has been adjudged in many cases that when these circumstances arise the contract which was entered into by the parties to this covenant was contrary to public policy and cannot be enforced."

In the Bullard case (10 Mont. 168) the contract is set forth **verbatim** and the clause containing the additional consideration for the contract, besides the freight charges, is as follows:

"And said parties of the second part, Bullard and Irvine, further covenant and agree **that they will not brew or manufacture any beer or other malt liquors at or within the corporate limits of Miles City, Montana Territory, between the date hereof and the 1st day of November, A. D. 1887.**"

In the Bullard case, there was an addtiional consideration given just the same as in the Root contract and in the Lents contract. The contract was for a certain period which had not expired, the same as the Lents, Root and Armour contracts, and yet the court found that these contracts were unlawful.

In Brundred v. Rice, 49 Ohio St. 640, 32 N. R. Rep., page 169, 34 Am. St. Rep. 589, Brundred agreed to and did build pipe lines from the oil fields to the railroad company, under an agreement in substance as follows: Said Brundred et al. agreed to build and construct a system of pipe line, pump, pumping stations, storage and receiving tanks, loading racks and telephone lines, etc., for the collection of the oil production of the oil fields of Ohio, and deliver the oil free of charge onto the cars on the line, exclusively on said railroad.

In consideration of the aforesaid, the said railroad agreed to divide with the said Brundred et al. the open rail rate of 30c per barrel on all oil collected from all shippers of oil over said road.

The court, in commenting on this contract, said: **"That the contract between Brundred and his associates was against public policy and void, will hardly admit of question."**

As said by Baxter, Justice, in Handy v. Railroad Co., 31 Fed. 689, **"Railroads are constructed for the common and equal benefit of all persons wishing to avail themselves of the facilities which they afford. While the legal title thereof is in the corporation or individuals owning them and to that extent private property, they are by the law and consent of the owners dedicated to the public use."** Except in the mode of using them, every person has the same right to demand the same services of the railroads on equal terms that they have to the use of the public highway or the government mails.

The cases at bar are the same as the Bullard, Armour cases. The Lents contract is the same as the contracts in these cases. Yet the Armour and Bullard contracts were held to violate the Interstate Commerce Act, and therefore to be void.

VI.

DUE PROCESS AND EQUAL PROTECTION OF LAW.

We claim that nothing in the record tends to show that the plaintiff in error has been deprived of property without due process of law or in any way denied equal protection of the laws within the meaning of the first section of the Fourteenth Amendment of the Federal Constitution.

(a) Due process of law has been frequently defined by this Court, and we believe a few excerpts from some of these decisions will present our view better than we are otherwise able to do it.

In Davidson v. New Orleans, 96 U. S. 97, at pages 104 and 105, the Court, in discussing this question, says:

"That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in *Kennard v. Morgan* (92 U. S. 480), and, in substance, repeated at the present term, in *McMillan v. Anderson* (95 Id. 37)."

Also, in the case of Public Clearing House v. Coyne, 194 U. S. 497, at pages 508 and 509, we find the following:

"That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of

constitutional limitations; *Murray's Lessee v. Hoboken Co.*, 18 How. 272, 280; *Bushnell v. Leland*, 164 U. S. 684. As was said by Judge Cooley, in *Weimer v. Bunbury*, 30 Michigan, 201: 'There is nothing in these words, ("due process of law") however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress.' If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government."

Also, it is held in Reetz v. Michigan, 188 U. S. 505, at page 508, that the right of appeal is not an essential element of due process of law. This case cites the case of *Pittsburgs, etc., Railway Company v. Backus*, 154 U. S. 421 (p. 427) quoting therefrom with approval.

"Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so."

From the foregoing, and many other decisions of this Court which we deem it unnecessary to cite, we submit that the essentials of due process of law are reasonable notice and a fair opportunity to be heard before some tribunal competent and proper to the subject to be considered and in a mode constituted to the nature of the cause, and not merely arbitrary and capricious. Under the Oregon act now being considered in the cases at bar

every possible opportunity has been given and been taken advantage of by the plaintiff in error for a full hearing with counsel and witnesses. Complaint was filed before the Railroad Commission; due notice given; a full hearing had; decision and order rendered by the Commission; complaint was filed by plaintiff in error in the Circuit Court for Marion County to set aside the orders; issues joined, and full hearing before the Circuit Court, additional testimony taken, the case sent back to the Commission for further consideration and reargument before the Commission, modification of the findings by the Commission, the controversy recertified to the Circuit Court and the orders there affirmed; appealed to the Supreme Court of the State, and, after decision adverse to plaintiff in error, then these writs. The fullest opportunity was given at every stage of the proceedings for all parties to be heard, with their witnesses, and to present their contentions, both by oral and written arguments, and this procedure is provided in the Oregon act. Therefore plaintiff in error cannot, with any grace, urge it has been deprived of property without due process of law, and especially when there is no evidence, as in the cases at bar, to show, or from which it can be reasonably inferred, that plaintiff has been deprived of any property whatever. It has merely been required to desist from an unjust discrimination, and the rates fixed by the Commission to adjust that dicrimination, if the result shall be the same as it was on the Lents division, will be to make the business of plaintiff much more profitable than it has been. As shown by the Government census, the city of Portland is growing at the rate of thirty thousand a year and the people rapidly, wherever the fares are so they can afford it, are seeking suburban homes along the electric lines.

(b) Equally without merit is the contention that plaintiff is denied equal protection of the law.

This proposition and being deprived of property without due process of law are so intimately connected that a discussion of one to a great extent involves a discussion of both, and much of the foregoing argument and most of the authorities cited are applicable to this point. No hard-and-fast rule to determine when a person or corporation is being deprived of the equal protection of the law has been nor can be formulated. Brannon in his treatise of the rights and privileges guaranteed by the fourteenth amendment quotes Senator Sumner, who took an active part in the proposal of the amendment, as expressing his construction of this clause of Section 1 as follows:

"These are no vain words. Within the sphere of their influence no person can be created, no person can be born, with civil or political privileges not equally enjoyed by all his fellow citizens; nor can any institution be established recognizing distinction of birth. Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble or black; he may be of Caucasian, Jewish, Indian or Ethiopian race; he may be of French, German, English or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black; nor is he Caucasian, Jew, Indian or Ethiopian; nor is he French, German, English or Irish. He is Man, the equal of all his fellow men. He is one of the children of the state, which, like an impartial parent, regards all its offspring with an equal care. To some it may justly allot higher duties according to higher capacities; but it welcomes all to its equal, hospital board. The state, imitating the divine justice, is no respecter of persons." (Page 318).

We can conceive of no language which will better define it, and when property rights are involved, the law must equally apply to all. One person cannot be deprived of property and another similarly situated not be affected by the same law. To illustrate, we call attention to *Yick Wo v. Hopkins, Sheriff*, 118 U. S., page 356. This case arose under an ordinance of the city of San Francisco

vesting the Board of Supervisors with power to arbitrarily grant or refuse a license to persons desiring to pursue the business of conducting laundries. No person could conduct a laundry without first having secured the consent of the Board unless the same was to be located in a brick or stone building, and no appeal or review from the decision was provided; their consent or refusal was final, and their exercise of this power was arbitrary and discriminatory. Consent being refused to Chinese, against which race a strong prejudice existed. The court in its opinion (page 374) says:

"And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."

It will be noticed that in this case the court held the exercise of the power to be an arbitrary discrimination against Chinese, and not to be allowed. The act itself, if there had been no unjust and arbitrary exercise of its powers, might have been held valid, but the principle is deducible from the decision that an act cannot be held void and unconstitutional unless it is possible under that act to deprive a citizen of liberty or some privileges which others similarly situated can enjoy, or else deprive some person or corporation of its propertly without having had its day in court, the same as all other citizens or corporations similarly situated could have. In the Railroad Commission act under consideration, every precaution is

taken to give the corporation and transportation companies their day in court, with all witnesses, and the courts have the authority and power to declare any decision of the Commission unreasonable and void if in their opinion it is so. None of the privileges guaranteed in the fourteenth amendment are in any way abridged, nor is there any testimony in the cases at bar to show, or from which it could be even remotely inferred, that the plaintiff in error is in any way deprived of the equal protection of the law nor of property without due process; in fact, a careful examination of the testimony shows these claims to be a mere subterfuge. The orders of the Railroad Commission prevent the plaintiff in error from denying equal protection of the law; they compel it to grant to the citizens of one locality equal privileges given to the citizens of another locality similarly situated. In Vol. 9, Federal Statutes, Annotated, at page 545, the rule is laid down as follows:

"What must constitute a denial of the equal protection of the law will depend in a large measure upon what rights have been conferred or protection extended under the constitution and laws of the particular state in which the question arises. As the constitutions and laws of the states vary, each case must to an extent depend upon its own facts. When the state itself undertakes to deal with its citizens by legislation, it does so under certain limitations, and it may not single out a class of citizens and subject that class to oppressive discrimination, especially in respect to those rights so important as to be protected by constitutional guaranty."

The foregoing authorities illustrate the intended applications of the principles of the fourteenth amendment, and an examination of the proceedings in the cases at bar and of the testimony will convince this Court that in no sense have the guaranties of the 14th amendment been contravened, either by legislative enactment or in the administration of the law, and that no federal question is

shown to have been legally raised in these proceedings, nor is any federal question necessary to their final determination. Confiscation nor any condition remotely approaching confiscation is shown in either case. Therefore, we respectfully submit that the motion to dismiss for want of federal jurisdiction should be granted, and if not granted, that the decisions of the State Court should be affirmed.

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